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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-1657

No. .....

EDWIN R. MacKETHAN, Receiver of Norfolk Savings and Loan Corporation,
Petitioner (Plaintiff Below),

v.

BURRUS, COOTES and BURRUS, et al.,
Respondents (Defendants Below).

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

J. VERNON PATRICK, JR.
Attorney for Petitioner

Of Counsel:

BARTON S. SACHER
BERKOWITZ, LEFKOVITS & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203

OREN R. LEWIS, JR.
JOHN E. FRICKER
LEWIS, WILSON, COWLES, LEWIS & JONES, LTD.
2054 North Fourteenth Street
Arlington, Virginia 22216

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

Petitioner (plaintiff below) prays that a Writ of Certiorari issue to review the December 10, 1976 decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

On April 3, 1975 the District Court entered an opinion which is not reported (and is appended at p. A-5 below) denying defendants' motion to dismiss this action for lack of subject matter jurisdiction. Following trial by jury, a $1,100,000 judg-

ment for plaintiff against defendants was entered on July 24, 1975 by the District Court. On July 29, 1975, the District Court entered an opinion which is not reported (and is appended at p. A-12 below), denying defendants' post-trial motion to have allowed, as a credit against plaintiff's judgment, $6,000,000 paid the plaintiff in earlier settlements, to which the defendants in this action had refused to contribute. In an opinion dated July 21, 1976, reported at 537 F.2d 1262 (and appended at p. A-16 below), the Court of Appeals reversed, holding that the District Court lacked jurisdiction of the action because the "certificates of investment" issued and sold by Norfolk Savings & Loan Corporation were "bank deposits" and not "securities" as defined by § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10). Plaintiff, supported by the SEC as *amicus*, requested rehearing. On December 10, 1976 the Court of Appeals withdrew its earlier opinion and entered an opinion reported at 545 F.2d 1388 (and appended at p. A-25 below), which reversed the $1,100,000 judgment for plaintiff entered by the District Court on the jury verdict, and directed the District Court "to use the $6,000,000 settlement payment made to the Receiver [by others] as a credit wiping out the whole of [the non-settling] defendants' liability and the verdict and judgment of $1,100,000 and costs." 545 F.2d 1388, at 1390.

THE JURISDICTION OF THIS COURT

The most recent opinion of the Court of Appeals for the Fourth Circuit was entered December 10, 1976. Rehearing was denied February 24, 1977. The Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In multi-defendant "federal question" litigation, where plaintiff has entered into *pro tanto* settlements with some (but not all) defendants:

(a) Does the December 10 opinion below improperly require the federal courts to allow deduction of prior settlement payments from a judgment thereafter obtained by plaintiff against non-settling defendants, *even when the plaintiff has not yet been made whole?*

(b) Does the December 10 opinion improperly require that non-settling defendants be given credit for payments made by others in prior settlements, and to discharge the non-settling defendants from liability, *even when the plaintiff has not yet been made whole?*

(c) Should the December 10 decision below be reversed on the ground that its inevitable effect will be to discourage future settlements and to encourage culpable defendants not to join in an overall settlement, in the hope that they may receive a windfall and a free ride—complete discharge from any adjudicated liability—based on *pro tanto* settlements to which they did not contribute?

(d) Should the decision below be reversed on the ground that it will deter plaintiffs from entering into *pro tanto* settlements?

(e) Is a plaintiff damaged in violation of a federal statute entitled to recover the full amount of his actual damages before the federal courts will apply the equitable doctrine of unjust enrichment in such a way as to diminish or prevent further recoveries?

(f) Does the District Court's July 29, 1975 opinion (reversed below) properly place the burden of proof (and attendant risk of non-persuasion) upon non-settling defendants, who move, *after* a jury trial in which they are adjudicated to be liable, to have the District Judge deduct from the amount of plaintiff's judgment against them the amount of settlement payments by others, to which they have not contributed?

(g) Is it appropriate for the District Courts to direct that evidence of prior settlements may not be offered in the hearing of the jury and reserve, for ruling by the District Judge, after entry of the jury's verdict, the issue of any credit to which non-settling defendants might be entitled based on prior settlement payments by others?

2. If, as suggested by the December 10 opinion of the Court of Appeals below, it is preferable for the District Courts to permit juries to hear evidence of prior settlements, and for the jury to answer special interrogatories with respect to total damages and the "apportionment of blame," would it not be fairer, and more in accord with sound judicial administration, for this Court to direct that this action be remanded to the District Court for retrial by jury (rather than by the Court of Appeals, which did not see the witnesses and did not hear the evidence, as did the trial court and jury)?

3. Where several wrongdoers have contributed to plaintiff's total damages, should the relative responsibility, "apportionment of blame" and "proportional fault" of each wrongdoer be determined by the jury or by the trial judge (rather than by an appellate court which has not heard the evidence)?

4. If, as suggested by the December 10, 1976 opinion of the Court of Appeals below, and by this Court's opinion in *United States v. Reliable Transfer Co., Inc.*, 95 S.Ct. 1708 (1975), the responsibility of the various wrongdoers for the plaintiff's total damages should have been allocated by the finder of fact based on an "apportionment of blame" or "proportional fault," would it not be better and more in accord with sound judicial administration for such issues to be determined by the jury or by the trial judge who heard the evidence, rather than by an appellate court based upon a cold record?

STATUTES AND REGULATIONS INVOLVED

Statutes and rules which may be relevant to the issues raised in this Petition are reproduced at A-1 through A-4, *infra*, and include Sections 3(a)(10), 10(b), 27 and 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(a)(10), 78j(b), 78aa, and 78bb; S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5; and Rule 408, Federal Rules of Evidence.

STATEMENT OF THE CASE

The plaintiff in this action is the court-appointed Receiver for Norfolk Savings & Loan Corporation ("NS&L"), which was closed because of insolvency on January 2, 1973. NS&L's officers were subsequently convicted of mail fraud by a United States District Court. Approximately 3500 people (including retired servicemen and elderly women) residing throughout the United States invested in "certificates of investments" issued by NS&L. After NS&L was closed, it was learned that NS&L was hopelessly insolvent, that its assets were worth more than $10 million less than recorded values shown on its books and in its financial statements, and that no deposit insurance protected the holders of NS&L debt securities.

Following his appointment, the Receiver filed actions against various defendants, alleging that NS&L had been defrauded in violation of the federal securities laws and state law.

Three separate actions, involving different defendants, brought by the Receiver, were tried before District Judge Albert V. Bryan, Jr. The evidence in each indicated that NS&L had suffered damages totalling approximately $10,800,000 plus interest from January 2, 1973 as a result of frauds perpetrated upon NS&L during a time period extending from 1959 to 1973.

Before the trial of the instant action against the BCB defendants, the Receiver entered into a settlement with Virginia National Bank, Landmark Communications, Inc., Landmark Securities, Inc., and several "outside directors" of NS&L. Under that settlement, the Receiver received $6 million, and expressly reserved whatever rights the Receiver might have against the BCB defendants.

The settling defendants who paid $6,000,000 in settlement to the Receiver were involved with NS&L throughout the entire period from 1959 to 1973. The BCB defendants, however, were only employed by NS&L during the last two years. The evidence indicated that NS&L had suffered more than $6,000,000 in damages *before* the BCB defendants began their employment.

The defendants in the instant action are the accounting firm of Burrus, Cootes & Burrus and its partners (herein collectively "BCB"), who acted as accountants for NS&L from December, 1970 until January 2, 1973, when NS&L was closed. Evidence below indicated that BCB defendants submitted two misleading and deceptive reports of examination, which indicated that NS&L was solvent when it was not; that it had earned income when it had not; and that defendants had examined all of NS&L's notes and collateral when in fact defendants had not done so and knew that notes and collateral were missing. Evidence presented to the jury indicated that from year-end 1970 until 1973, while the BCB defendants were acting as accountants for NS&L, NS&L was defrauded of about $2,420,500 representing the proceeds of the sale of its certificates of investment. A jury verdict was returned for plaintiff against the BCB defendants for $1,100,000 plus interest, following instructions which limited any award of damages to those proximately caused by the BCB defendants' violations of SEC Rule 10b-5. By pretrial order, the District Court prohibited the offer of any evidence concerning related actions or prior settlements in the presence of the jury.

After the jury verdict and the entry of judgment against them in the instant action, the BCB defendants filed their Motion for Credit in the District Court. By that motion, the BCB defendants sought to obtain an order from the District Court applying the $6 million received by the Receiver in prior settlements as a credit against the judgment entered against them. In an opinion entered July 29, 1975 the District Court denied the BCB defendants' motion, stating in part:

> "Adopting the rule urged by the defendants would discourage settlements by a plaintiff with those deemed most culpable because he would thereby forfeit his right to obtain anything additional from those deemed less culpable, or who might ultimately be found to be so. The defendants here *have* been found to be culpable. They should not be allowed a "free ride"[3] because they declined, for whatever reason, to participate in the pretrial settlement. They, as the adjudicated wrongdoer, ought to be the ones to point out where and to what extent the judgment against them is already covered by the prior settlement. This they candidly admit they cannot do." (Footnote omitted).

The BCB defendants appealed, expressly waived any right to a new trial, and argued nine separate grounds for reversal of the District Court's judgment and denial of their Motion for Credit.

On July 21, 1976, a panel of the Court of Appeals reversed, and directed that judgment be entered for defendants, on the ground that NS&L's certificates of investment were "bank deposits", not "securities", ". . . no matter how alluringly . . . and . . . deceptively the banking company, or its near equivalent, the savings and loan corporation, sought to attract such accounts . . ." 537 F.2d 1265.

The Receiver requested rehearing *in banc*. The Securities and Exchange Commission filed an *amicus curiae* brief supporting the Receiver's position.

On December 10, the panel granted the Receiver's Petition for Rehearing, withdrew the July 21 opinion, and substituted the December 10 opinion, but left unchanged the July 21 mandate reversing the judgment of the District Court and directing the District Court to enter judgment for defendants, stating:

> "We feel constrained to reverse the judgment of the District Court, and to direct it to use the $6,000,000 settlement payment made to the Receiver as a credit wiping out the whole of defendants' liability under the verdict and judgment for $1,100,000 and costs." 545 F.2d 1390.

THE BASIS FOR THE DISTRICT COURT'S JURISDICTION OF THIS ACTION

Plaintiff contends and the District Court held in its April 3, 1975 opinion (p. A-5, *infra*) that the District Court had jurisdiction of this action pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa. In addition, plaintiff contends that the District Court had jurisdiction of this action under 28 U.S.C. §§1337 and 1339, and under Section 22 of the Securities Act of 1933, 15 U.S.C. §77v.

REASONS FOR GRANTING THE WRIT

The December 10 decision of the Court of Appeals presents important questions of Federal law and policy concerning the effect of *pro tanto* settlements in complex, multi-defendant litigation arising under Federal statutes. If left standing, the December 10 decision will deter partial settlements, encourage culpable defendants to refuse to join in a complete settlement, promote litigation, and substantially lengthen jury trials.

The December 10 decision appears to conflict with prior holdings and the stated policy of this Court favoring settlements,[1] casts doubt upon the correctness of decisions of two Courts of Appeals[2] which hold that evidence of prior settlements should be withheld from the jury and that the District Judge (rather than the jury) should allow any credits due for prior settlements, appears to conflict in principle with decisions of other circuits[3] and with decisions of this Court in *American Surety Co. v. Sampsell*, 327 U.S. 269, 272-274 (1946) and *Prudence Realization Corporation v. Geist*, 316 U.S. 89, 95-96 (1942); and appears to conflict in principle with Rule 408 of the Federal Rules of Evidence.[4] Moreover, the decision represents such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

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[1] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-349 (1971); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 500-514; *Birdsell v. Shaliol*, 112 U.S. 485, 488-489 (1884); and *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1 (1865).

[2] *E.g., Billiot v. Sewart Seacraft, Inc.*, 382 F2d 662, at 665-666 (5th Cir. 1967); *Martello v. Hawley*, 300 F.2d 721 (D.C.Cir. 1962); *cf Gould v. American Hawaiian S.S. Co.*, 535 F.2d 761, at 781-784 (3d Cir. 1976).

[3] See, *e.g., Rose v. Associated Anesthesiologists*, 163 App. D.C. 246, 501 F.2d 806 (1974) and *Schumacher v. Rosenthall*, 226 F.2d 946, 948 (7th Cir. 1955).

[4] See p. A-4, *infra*.

ARGUMENT

I

The Decision Below Conflicts With Prior Holdings of This Court and the Stated Policy of This Court to Favor and Encourage the Settlement of Litigation in the Federal Courts.

The trial court concluded, and the evidence indicates, that NS&L sustained losses as of January 2, 1973 totalling $10,800,000. Thus, after the $6,000,000 paid the Receiver in prior settlements, the Receiver for NS&L still had uncompensated losses of $4,863,785 plus approximately $2,000,000 in pre-trial interest—an amount far in excess of the $1,100,000 jury verdict and the judgment against the BCB defendants entered by the District Court. Yet the opinion of the Court of Appeals reaches a grossly inequitable and unconscionable result by wiping out the judgment below, leaving the plaintiff with huge uncompensated losses, and giving the BCB defendants a free ride and windfall (discharge from their adjudicated liability) based on a settlement to which they did not contribute a penny.

In *Lovejoy v. Murray*, 70 U.S. (3 Wall. 1) (1865), plaintiff first sued a joint trespasser and recovered a judgment, but received only a partial satisfaction on that judgment. This Court upheld plaintiff's right to recover the balance of his total damages in a second suit against another joint trespasser, stating:

> "But in all such cases, what has the defendant in such second suit done to discharge himself from the obligations which the law imposes upon him, to make compensation? *His liability must remain, in morals and on principle, until he does this.* The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and this is true. But when the plaintiff has accepted *satisfaction in full* for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. *But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.*
>
> We are, therefore, of opinion that *nothing short of satisfaction or its equivalent*, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment." *Id.*, at 17. (Emphasis supplied.)

See also Birdsell v. Shaliol, 112 U.S. 485, 488-489 (1884).

Building upon the aforementioned principle, this Court applied the reasoning and result of *Lovejoy, supra*, and *Birdsell, supra*, to a prior settlement situation in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964):

> "In Birdsell v. Shaliol, supra, 112 U.S. at 489, 5 S.Ct., at 246, the Court applied to a patent case the proposition that '*By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass.' What is true of a judgment is true of a release.* See, Prosser, supra, at 241-244. A release given a direct infringer in respect of past infringement, which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights. Thus the District Court was correct in denying that 'defendants are entitled to the fortuitous benefit of the old joint tort-feasor rule.' The mere fact that the agreement released Ford and Ford's

customers for their past infringement does not negate Aro's liability for *its* past infringement." (Emphasis supplied.)

Following *Aro, supra*, this Court applied the release rule in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 349 (1971), involving a claim under the federal antitrust laws, stating federal policy as follows:

"We perceive no reason to follow a different rule in antitrust litigation. Indeed, of the three available rules, the rule adopted in *Aro* is most consistent with the aims and purposes of the treble-damage remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; often, defendants who have conspired together must be sued in a number of different States if all are to be reached, and, while defendants in some States may be willing to enter into settlements, defendants in others may not. *To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys.* The straightforward rule is that a party releases only those other parties whom he intends to release. Our conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them, and its adoption of the rule to which we adhere. See Restatement (Second), Torts § 885, Comments a-d (Tent. Draft No. 16, 1970).

"The intention of the parties to the 1957 release is absolutely clear from the contract made prior thereto in which they agreed to exchange releases. That contract expressly provided for releases 'to bind or benefit' the party and 'the parent and subsidiaries of the party giving or receiving

such release ('subsidiaries to include corporations in which the party has stock ownership of 50% or more).' We accordingly have no hesitancy in holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

"Of course, to the extent that the $10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959-1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. *It is settled that entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.* See Aro Mfg. Co. v. Convertible Top Replacement Co., *supra*, 377 U.S. at 502-503, 84 S.Ct., at 1540-1541 (plurality view); McKenna v. Austin, *supra*, 77 U.S. App. D.C., at 234; 134 F.2d at 665 Restatement, Torts § 885(3) (1939); W. Prosser, Torts § 46 (2d ed. 1964). *However, the record below indicates that a defense of payment could not here be sustained for, while the 1957 release did extend to future damages, the undisputed and unimpeached testimony of Zenith's witnesses was that the $10,000,000 settlement was understood by the parties as compensation only for Zenith's damages up to the date of the release.* Thus, it is not surprising that, although *HRI did advance a claim of payment upon its post-trial motion* in the District Court, it has made no such argument in this Court. Since the claim was untimely presented below, was not pressed here, and is not sustainable on the facts

contained in the record, we see no basis for its further consideration." (Emphasis supplied; footnotes omitted.) *Id.*, at 346-348.

Being mindful of the above-quoted body of law which has developed in this Court over more than 100 years of practice, it is clear that the opinion of the Fourth Circuit herein contravenes both federal law and federal policy as enunciated by this Court. For this reason, alone, this Court should grant certiorari.

II

The Decision Below Casts Doubt Upon Decisions of the Fifth Circuit and District of Columbia Holding That the Trial Judge (Not the Jury) Is to Decide the Effect Which the Federal Courts Should Give *Pro Tanto* Settlements; Guidance From This Court Appears to Be Essential.

The opinion of the Court of Appeals apparently disapproves the procedure following in the trial court below (expressly recommended as the "better procedure" by two Courts of Appeals);[5] implies that the jury (rather than the trial judge) should have decided the effect of any prior settlement; and implies that the jury should have been instructed by the trial court below to answer special interrogatories relating to total damages and apportioning relative blame, presumably after hearing evidence of the prior settlement and wrongful acts of others, but *reverses with instructions to enter a judgment for defendants* (thereby depriving paintiff of any opportunity to have the issue decided by the jury on instructions consistent with the Court of Appeals' suggestion). The resolution of conflicting authority among the

[5] *Billiot v. Sewart Seacraft, Inc.*, 382 F.2d 662 (5th Cir. 1967) and *Martello v. Hawley*, 300 F.2d 72 (D.C. Cir. 1962).

Courts of Appeals as to the proper procedure for determining the effect of a prior *pro tanto* settlement is a question of national importance which merits the attention of this Court. Moreover, the opinion of the Court of Appeals appears to violate Rule 408, Federal Rules of Evidence, requiring this Court to resolve this additional conflict.

The BCB defendants did not want the evidence of the prior settlement and prior trials to go before the jury (R.Vol. XXV, pp. 44-46).[6] Moreover, prior to the trial below, the trial court ruled that it would not permit the jury to hear evidence of the prior settlements, but would instead reserve the issue of credit for decision by the court following the jury verdict, a procedure designed to protect defendants from possible prejudice, recommended as the "better procedure" by two Courts of Appeals, in *Billiot v. Sewart Seacraft, Inc.*, 382 F.2d 662 (5th Cir. 1967); and *Martello v. Hawley*, 300 F.2d 721, 724 (D.C.Cir. 1962).

In *Billiot, supra*, the Fifth Circuit succinctly states its view as follows:

> "If the trial is to a jury, we think that the better procedure is to withhold evidence of the settlement from the jury which will determine the total damages, if any, caused by Seacraft. The trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant." 382 F.2d, at 665-666.[7]

[6] References to "R.Vol. . . ." are to the record volume number and page of the Record on Appeal.

[7] *Billiot, supra*, n. 6, at 666 states:

> " 'We can say positively when [this] method is employed, that the jury has brought in a verdict in an amount which they believe will adequately and justly compensate the plaintiff, that the proper deduction has been made because the Judge himself in the judgment made the proper deduction.
>
> " 'The other method would be to place evidence before the jury, with instructions to render a verdict, less the amount re-

Similarly, the Court of Appeals for the District of Columbia considered the precise question in *Martello v. Hawley*, 300 F.2d 721, 724 (D.C.Cir. 1962), stating:

> "In a case such as the one before us, the jury should not be allowed to know either the fact or the amount of any settlement; such information only tends to mislead them in their deliberations concerning a just compensatory verdict. However, if the fact or the amount of the settlement, for some reason or other, is brought to the attention of the jury, as happened in the instant case, then the judge, in his charge, should instruct the jury to disregard this information in arriving at their evaluation of the damages, if any, suffered by the plaintiff as a result of his injury, and to bring in a verdict representing the full amount of the plaintiff's damages. If contribution is found applicable in the circumstances, the court should credit the amount of the verdict by one-half [based upon that jurisdiction's *pro rata* contribution among joint tort-feasors' rule]."

To permit evidence of a prior settlement to go before the jury would almost inevitably complicate and lengthen the trial. It might require the parties to explore all sorts of collateral issues, such as the contribution and net worth of each Settling Defendant, the extent of each Settling Defendant's culpability or lack of culpability, evaluation of the risks of appeal on jurisdictional or other grounds, and the like. Moreover, it involves some risk that the jury might be unfairly prejudiced against the BCB defendants. The trial court adopted a procedure designed to expedite the trial of this action, protect the non-settling defendants from possible jury prejudice and recommended as the "better

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ceived. It occurs to us that this latter procedure, • • • [is undesirable] because who would be able to positively say if the latter method were adopted, that the jury actually estimated the injury to the plaintiff and then deducted what he had already received.' State Farm Mut. Auto. Ins. Co. v. Bourne, supra, 220 F.2d at 923."

procedure" by two Courts of Appeal in *Billiot v. Sewart Seacraft, Inc.*, 382 F. 2d 662 (5th Cir. 1967), and *Martello v. Hawley*, 300 F.2d 721 (D.C.Cir. 1962). The trial judge reserved the credit question for decision after the jury verdict.

This action was tried under the recently adopted Federal Rules of Evidence of which Rule 408 (Compromise and Offers to Compromise) specifically provides, in pertinent part:

> "Evidence of . . . (2) accepting . . . a valuable consideration in compromising . . . a claim which was disputed as to either validity or amount, is *not admissible to prove liability for or invalidity of the claim or its amount* . . ." (Emphasis supplied.)

The above-quoted language is identical to that portion of the Rule transmitted to the Congress from this Court.[8] Thus, evidence concerning a prior, completed settlement between a party and third persons is *not* admissible, as stated by the Advisory Committee:

> ". . . A more consistently impressive grounds [for admissibility] is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person."[9]

Rule 408 is premised upon established policy in the federal courts that proposed or accepted prior settlements are not evi-

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[8] 2 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE: Commentary on Rules of Evidence for the United States Courts and Magistrates 408-2 (1976) (hereinafter "WEINSTEIN'S EVIDENCE").

[9] 2 WEINSTEIN'S EVIDENCE 408-7 to 408-8.

dence of an admission of the validity of a claim or the amount of damages attendant thereto.[10]

Your petitioner submits that the position of the Courts of Appeals for the D.C. and Fifth Circuits is, indeed, the "better approach" to this situation, considering the potential benefits or detriments attendant to the two approaches, including the time and expense of litigation involved in each. In any event, this Court's guidance is necessary to square the present conflict between the circuits, the Rule 408 conflict, and to effectuate this Court's enunciated policy of promoting *pro tanto* settlements in federal statutory actions.

III

The Decision Below Conflicts in Principle With Rose v. Asso. Anesthesiologists, 501 F.2d 806 (D.C. Cir. 1974); and American Surety Co. v. Sampsell, 327 U.S. 269, 272-274 (1946); Unless Revised by This Court, the Decision Below Will Improperly Require the Federal Courts to Deny Full Recovery to a Plaintiff Who Enters Into a *Pro Tanto* Settlement.

The only basis for the BCB defendants' motion for credit is the equitable doctrine of unjust enrichment. See *Billiot v. Sewart Seacraft, Inc.*, 382 F.2d 662 at 664 (5th Cir. 1967).

An equitable rule should never be applied arbitrarily or rigidly to achieve an unjust and grossly inequitable result. See,

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[10] *West v. Smith*, 101 U.S. 263, 272-73, 25 L.Ed. 809, 813 (1879); *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548, 23 L.Ed. 868, 871 (1876); *Insurance Companies v. Weides*, 81 U.S. (14 Wall.) 375, 381, 20 L.Ed. 894, 895 (1872) ("A compromise proposed or accepted is not evidence of an admission of the amount of the debt"). *See also* 2 WEINSTEIN'S EVIDENCE, Rule 408, at pages 408-1 to 408-33, especially ¶ 408[04] (Accepted Offers of Compromise), at pages 408-22 to 408-26, for a thorough discussion of Rule 408.

e.g., Rose v. Associated Anesthesiologists, 501 F.2d 806 at 809 (D.C. Cir. 1974):

> "The one-compensation rule, grounded in unjust enrichment, is not to be applied in such a way as to generate unjus. enrichment to the only litigating defendant."

Compare *American Surety Co. v. Sampsell*, 327 U.S. 269, 272-274 (1946), denying the equitable remedy of subrogation to a surety where creditors have not yet been made whole, where the Court stated:

> ". . . controlling equitable principles forbade the surety from sharing the bankrupt's assets on equal terms with any creditors who are members of the class its bond has been given to protect."

Here, the BCB defendants were hired and paid to act as accountants for NS&L. They were hired to protect the interests of the creditors of NS&L, who are now creditors of the receivership estate. Is it equitable to give the BCB defendants a credit for a prior settlement by others, to which the BCB defendants did not contribute, even though the NS&L receivership estate has not yet been made whole, and its 3500 creditors must suffer?

Would it not be equitable to affirm the judgment rendered below? Affirmance would not require the BCB defendants to pay a penny more than that for which they have been found liable. Affirmance would in no way unjustly enrich the plaintiff, for the plaintiff has not yet been made whole.

IV

The Decision of the Court of Appeals Reversing With Instructions to Enter Judgment for Defendants, Rather Than Remanding for Retrial by Jury or Additional Consideration and Findings by the Trial Court, Is Such a Serious Departure From the Accepted and Usual Course of Judicial Proceedings, as to Require the Exercise of This Court's Supervisory Powers.

Not having heard any of the evidence, the appellate panel's December 10 opinion makes its own findings of fact, sets aside a verdict reached by the jury after a full and fair trial, sets aside the district court's judgment, and holds erroneous a well-reasoned opinion entered July 29, 1975 by District Judge Bryan (who heard the evidence *ore tenus*) denying defendant's post-trial motion for credit, all based upon the panel's *ipse dixit* that "one-sixth is demonstrably a gross understatement of an appropriate attribution"[11] of the $6,000,000 settlement made by others to the damages which the jury found were caused by the BCB defendants—a holding by the Court of Appeals that the BCB defendants had proved that which the District Court's July 29, 1975 opinion observed: "they candidly admit they cannot do."[12]

The December 10, 1976 Opinion of the Court of Appeals for the Fourth Circuit:

1. Exhibits a seeming lack of concern for the defrauded plaintiff (not yet made whole) and undue concern for the defendants, who are adjudicated wrongdoers.

2. Reaches a grossly inequitable and unconscionable result, giving the BCB defendants, *adjudicated wrongdoers*, a free ride

[11] 545 F.2d 1388, at 1391.

[12] See A-12, *infra*.

and windfall (discharge from their adjudicated liability), notwithstanding:

A. There has been no showing that payment of the full $1,100,000 judgment entered below would in any way unjustly enrich the NS&L receivership estate;

B. On the contrary, the trial court concluded (R.Vol. XXV, p. 42), and uncontroverted evidence indicates, that the NS&L receivership estate sustained total losses of more than $10,800,000; thus, NS&L still has uncompensated losses (over and above the prior (6,000,000 settlement) of $4,863,785 (App. 77a;[13] R.Vol. XXVI, p. 398) plus about $2,000,000 in interest (R.Vol. XXVII, p. 399)—an amount far in excess of the $1,100,000 judgment rendered against the BCB defendants;

C. The trial judge properly held that the burden of proof was on the BCB defendants to show that collection of the $1,100,000 judgment would unjustly enrich the NS&L receivership estate (App. 46a); and

D. The BCB defendants admitted before the district court they could not carry that burden of proof (App. 46a; R.Vol. XXXIII, p. 1135).

3. Reverses and renders, based upon the Fourth Circuit's unsupported and erroneous assumption that the $6,000,000 paid by others in settlement "necessarily covers the same damages to NS&L as were included in the $1,100,000 verdict and judgment in the instant case,"[14] notwithstanding:

A. There was evidence below that before the BCB defendants were first engaged, NS&L had sustained more

[13] References to "App. . . ." are to the Appendix prepared in the appeal to the Fourth Circuit.

[14] 545 F.2d 1388, at 1390.

than $6,000,000 in damages as a result of conduct participated in by the Settling Defendants[15] (App. 234a);

B. The BCB defendants admitted below that they could not prove that the $6,000,000 paid in by the Settling Defendants was attributable to the damages caused by the BCB defendants (R.Vol. XXXIII, p. 1135);

C. Each of the Settling Defendants had participated in wrongdoing commencing as early as 1959 (R. Vol. XXXVIII, pp. 96-100);

D. The BCB defendants did not begin work for NS&L until year-end 1970 (App. 222a);

E. NS&L had already sustained unreported losses aggregating $5,929,735.75 (exclusive of interest) at year-end 1969 and aggregating $7,785,697.57 (exclusive of interest), at year-end 1970 as a result of unrelated wrongdoing in which the Settling Defendants participated *before* the BCB defendants first began work for NS&L (App. 77a; plaintiff's exhibit 243 in *MacKethan v. Landmark*, CA 202-74-A); when prejudgment interest claims are added either amount exceeds the $6,000,000 paid by the Settling Defendants;

F. The BCB defendants' counsel urged the jury to limit its award in this action to damages sustained after year-end 1970 (R.Vol. XXXII, pp. 1946-47); and

G. NS&L sustained damages of more than $1,100,000 after year-end 1970 (App. 77a).

If the judgment of the trial court below could not be affirmed on the record, then the only appropriate appellate remedy was

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[15] Landmark Communications, Inc., Landmark Securities, Inc., Virginia National Bank, Paul S. Huber, Jr., S. C. Lampert, James Roberts, and Henry Lankford are herein referred to as "Settling Defendants."

for the Court of Appeals to: (1) remand for additional findings by the district judge below on the credit issue, or (2) remand for a new trial by jury (with the jury being permitted to hear evidence of the prior settlement and to decide the amount of any remaining uncompensated damages for which the BCB defendants may properly be held liable).

The plaintiff (and more than 3500 creditors of NS&L who would receive the proceeds of the jury verdict below) will be deprived of their rights and an unfortunate departure from accepted appellate remedies and accepted judicial procedures will be established, unless this Court grants your petitioner's writ.

CONCLUSION

For the reasons given hereinabove, this Court should issue its Writ of Certiorari to the Court of Appeals for the Fourth Circuit so as to permit this Court to review that Court's decision in this case.

Respectfully submitted,

J. VERNON PATRICK, JR.
One of Attorneys for Petitioner

Of Counsel:

BARTON S. SACHER
BERKOWITZ, LEFKOVITS & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203

OREN R. LEWIS, JR.
JOHN E. FRICKER
LEWIS, WILSON, COWLES, LEWIS & JONES, LTD.
P. O. Box 827
Arlington, Virginia 22201

APPENDIX

15 U.S.C. § 78c(a)(10):

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b):

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27 of the 1934 Act, 15 U.S.C. § 78aa:

JURISDICTION OF OFFENSES AND SUITS

Sec. 27. The district courts of the United States, the district court of the United States for the District of Columbia, and the

United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

15 U.S.C. § 78bb:

§ 78bb. Effect on existing law

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any

person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

(b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this chapter or the rules and regulations thereunder.

June 6, 1934, c. 404 § 28, 48 Stat. 903.

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5:

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange,

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 408, Federal Rules of Evidence:

Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In the United States District Court for the
Eastern District of Virginia
Alexandria Division

Edwin R. MacKethan, Receiver of Norfolk Savings and Loan Corporation, Plaintiff, v. Burrus, Cootes and Burrus, et al., Defendants.	Civil Action No. 143-75-A.

MEMORANDUM OPINION AND ORDER

This is an action by the Receiver of Norfolk Savings and Loan Corporation (NS&L) which was closed because of insolvency on January 2, 1973. The defendants are a partnership and its partners and employees engaged in the practice of certified public accounting. The defendants conducted examinations of the financial condition of NS&L during periods prior to its closing, and their acts and omissions in this connection, according to the complaint, operated as a fraud upon NS&L. Violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 are asserted as well as violations of state law under the Court's pendent jurisdiction.

The defendants have filed a motion to dismiss on various grounds and they will be discussed in order. The discussion will be brief since in all but a few instances the matters raised have been ruled on in prior related cases:

I. The Complaint Filed Herein Should Be Dismissed Insofar as Its Attempts to Assert a Claim for Civil Damages Based Upon § 17 of the Securities Act of 1933, 15 U.S.C. § 77q.

This part of the motion is well taken and the Court grants it. As indicated in Judge MacKenzie's opinion in *Thomson v. Bowles* (E. D. Va. No. 247-71-N, Dec. 23, 1971) there is authority to the contrary; however, the more "considered opinions . . . have come out the other way." 6 L. Loss, *Securities Regulation* 3914 (1961, Supp. 1969).

II. The Complaint Should Be Dismissed for Lack of Jurisdiction Over the Subject Matter Due to Plaintiff's Failure to Allege That a "Security" Is Involved Within the Meaning of Either the Securities Act of 1933 or the Securities Exchange Act of 1934.

Defendants cite *Bellah v. First National Bank of Hereford*, 495 F. 2d 1109 (5th Cir. 1974), and the definition of the term "security" in § 3(a)(10) of the 1934 Act, 15 U.S.C. § 78(c)(a)(10). They argue that the allegations with regard to securities in the complaint are insufficient to meet the definition. Such a defect in pleading, even were it present, of course would not warrant dismissal of the action, but perhaps would prompt a requirement of a more definite statement. In any event the facts as to the nature of the transaction should be left to ascertainment by discovery. Here, however, we know (or will by the time discovery is complete) what the particular transactions were —they involved certificates of investment, notes transferred to the Virginia National Bank, some for longer duration than nine months and some not, and notes allegedly purchased by NS&L in connection with officer related or roll-over loans. The last of these has not been considered by the Court in the cases

previously tried;[1] and need not be now for the purposes of a motion to dismiss. The first two have been considered in the previous cases and have been ruled to be "securities" within the meaning of the 1934 Act as a matter of law. The Court adheres to that ruling. The long term notes transferred to Virginia National Bank were not issued in the context of a commercial loan transaction of the type discussed in *Bellah*. The certificates of investment involved here seem much more similar to those under consideration in *Tcherepnin v. Knight*, 389 U.S. 332 (1967), than to the certificate of deposit in *Bellah*.

The defendants further argue in their Supplemental Memorandum that all securities issued by NS&L, except those evidencing non-withdrawable capital, are excluded from the coverage of Section 10(b). The defendants rightly claim that Section 10 is not self-implementing, but the logic of their argument ceases there. It appears to the Court that the defendants contend that the term "manipulative or deceptive device or contrivance" as used in Section 10(b) is to be interpreted solely by the definition found in Rule 10b-1. That rule basically provides that with respect to any security exempted by rule from Section 12(a), the registration provision, any activity which would have violated Section 9(a) if the security had been registered shall be deemed to violate Section 10(b). 3 L. Loss, *Securities Regulation* 1546, n. 53 (1961, Supp. 1969).

Whether the securities exempt from 12(a) registration under one subsection of Section 12 are to be excluded by implication from coverage under Rule 10b-1, which specifically includes other exempt securities, is not conclusive. Virtually every other rule under Section 10(b) explicitly expands what shall constitute such a device or contrivance. Particularly, Rule 10b-5 specifies unlawful employment of manipulative and de-

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[1] *MacKethan v. Landmark* (E. D. Va., No. 202-74-A); *MacKethan v. Virginia National Bank* (E. D. Va. 203-74-A).

ceptive devices "in connection with the purchase or sale of *any* security" (emphasis added). The defendants have cited no case law, and the Court is aware of none that would support their ingenious argument. It is the opinion of the Court that to accept the limited definition of a device or contrivance found in Rule 10b-1 as exclusive would be clearly erroneous.

III. **The Complaint Should Be Dismissed Due to Plaintiff's Failure to Sufficiently Allege Use of Means or Instrumentality of Interstate Commerce or the Mails Within the Meaning of the Securities Exchange Act of 1934.**

If the allegations as to these matters are insufficiently particularized, the remedy is not to dismiss the action, but to permit ascertainment of the facts through discovery.

IV. **The Court Should Refuse to Take Pendent Jurisdiction Over Any State Claims Alleged in the Complaint.**

While the Court reserves the right to sever the pendent claims from the Securities Act claims for trial, perhaps depending on the resolution or status of the claims now pending in the state court, it is apparent from the pleadings as well as the Court's own familiarity with the other federal actions previously tried, *supra*, n. 1, that substantially identical facts will support a recovery under both federal and non-federal law. This is all that is necessary under *Hurn v. Oursler*, 289 U.S. 238 (1933), and *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The enabling decree of the Circuit Court of the City of Norfolk, Virginia, of February 19, 1975, includes the pendent claims, and the Court at this stage will not decline to exercise its pendent jurisdiction.

V. **The Complaint Fails to State a Claim for Which Relief Can Be Granted Because the Plaintiff Has Failed to Allege the Breach of Any Duty Owing to Any Person Which Resulted in Any Harm to Norfolk Savings and Loan Corporation.**

The defendants cannot be heard to say that a failure to disclose on the part of accountants is not actionable at the instance of the corporation on the ground that the directors should already have been aware of the information. There is charged here a fraud on the corporation by the corporation's officers and directors, either participated in or aided and abetted, or both, by the defendants. To say that the defendants are excused from liability *to the corporation* because there was no one to whom they could tell of their findings or what they should have found is unappealing, to say the least.

VI. **The Complaint Fails to State a Claim Against Burrus, Cootes and Burrus or Its Partners for Punitive Damages Because Punitive Damages Are Not Recoverable for Violations of the Federal Securities Laws.**

While the Court agrees that punitive damages are not recoverable under the Securities Exchange Act of 1934, *Green v. Wolf Corp.*, 406 F. 2d 291 (2nd Cir. 1968); *Baumel v. Rosen*, 412 F. 2d 571 (4th Cir. 1969) (dictum), this is not true for the pendent state claims. *Coffee v. Permian Corp.*, 474 F. 2d 1040 (5th Cir. 1973). That common law fraud will support an award of punitive damages in Virginia where the requisite elements are present needs no citation of authority.

VII. **The Complaint Should Be Dismissed Because the Pleadings Show That Norfolk Savings and Loan Corporation Was Guilty of Wrongdoing Which Bars Its Claim.**

The defense of *in pari delicto* sought to be interposed here is rejected. This Court has recognized, in *Landmark, supra* n. 1, and *Virginia National Bank, supra* n. 1, that the corporation, as an entity apart from its own defrauding officers or directors, is a "person" entitled to recover from those in complicity with those officers or directors under Rule 10b-5. The former rulings are adhered to.

VIII. **The Complaint Fails to State a Claim Upon Which Relief Can Be Granted Under Rule 10b-5 Because Plaintiff Has Failed to Allege the Requisite Scienter or Intent on the Part of Burrus, Cootes and Burrus.**

Cohen v. Franchard Corp., 478 F. 2d 115, 123 (2nd Cir. 1973), cited in defendants' memorandum, was the basis of the Court's charge to the jury on the issue of *scienter* in the two cases which have gone to trial. The Court intends to apply the same standard in this case; however, the failure to *allege* that standard does not warrant dismissal. It is the proof at trial upon which submission of that issue will depend.

IX. **(Discussed under II)**

X. **The Complaint Should Be Dismissed for Failure to State a Claim Upon Which Relief May Be Granted Because Plaintiffs Have Failed to Allege Damage "in Connection" With a Securities Transaction as Required Under the 1934 Act.**

The issue of what type of damage is recoverable cannot be decided on a motion to dismiss. Whether the items of damage

alleged can be proved and if proved, causally connected with the sale or purchase of securities and these defendants, must await trial.

XI. **(Discussed under VI)**

Except with respect to Item I, the motion to dismiss is denied; and it is so ordered.

/s/ G. V. BRYAN
United States District Judge

Alexandria, Virginia

April 3rd, 1975

In the United States District Court for the
Eastern District of Virginia
Alexandria Division

Edwin R. MacKethan, Receiver of Norfolk Savings & Loan Corporation, Plaintiff, v. Burrus, Cootes & Burrus, et al., Defendants.	Civil Action No. 143-75-A

MEMORANDUM OPINION AND ORDER

This is an action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5 (1974), against the accounting firm of Burrus, Cootes & Burrus and its partners. A jury trial resulted in a $1,100,000.00 verdict for the plaintiff on July 24, 1975, against all the defendants. Two prior actions by the same plaintiff have resulted in verdicts for $2,000,000.00 on February 5, 1975, against Landmark Communications and others (Landmark), and for $4,000,000.00 on February 14, 1975, against Virginia National Bank (VNB).

Subsequent to the two prior verdicts and before the trial of the instant action, the two judgment debtors and certain former directors of the defunct Norfolk Savings and Loan Corporation, of which the plaintiff is receiver, settled all the claims of the receiver against those persons and entities, including the two judgments. The claims against Landmark and VNB were settled for $6,000,000.00. On July 17, 1975, payment of this $6,000,000.00 was made to the plaintiff, a release was executed by the plaintiff in their favor, and as part of the settlement an

order has been entered setting aside and vacating the judgments against Landmark and VNB and dismissing the actions against them.

Judgment has been entered in the instant action on the $1,100,000.00 verdict, and the defendants have moved to have allowed, as a credit against that judgment, the $6,000,000.00 paid in settlement by VNB and Landmark. The effect of this, of course, would be to "wipe out" the present judgment and eliminate any obligation on the part of the defendants to pay the plaintiff anything except, perhaps, costs.

The testimony in all three actions concerning damages was substantially the same. In each action the plaintiff claimed damages totalling between ten and eleven million dollars. The effect of the vacation of the two judgments and dismissal of the two prior actions is to nullify the trial proceedings in those actions. It is impossible for the Court, however, with or without the benefit of the former trial proceedings, to apportion the verdicts or the settlement payments, or all of them, so that it can be determined whether there is an overlapping of recoveries.

Defendants cite the general rule of damages that:

> . . . whether the tort feasors be joint or independent, the injured party is entitled to no more than compensation for his injury; and . . . consideration received from one, for the release of any claim against him, operates to reduce pro tanto the amount recoverable from the other. *Husky Refining Co. v. Barnes*, 119 F. 2d 715, 716 (9th Cir. 1941).

A similar rule appears in a tentative draft of Restatement (Second) of Torts:

> Payments made by any person in compensation of a claim for a harm for which others are liable as tort-feasors diminish the claim against them, whether or not the person

> making the payment is liable to the injured person, and whether or not it is so agreed at the time of payment, or the payment is made before or after judgment. The extent of the diminution is the amount of the payment made, or a greater amount if so agreed. Restatement (Second) of Torts, § 885(3) (Tent. Draft No. 16, 1970).

The object of such a rule, of course, is to prevent a double recovery by the plaintiff. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 348 (1971).

The defendants cite numerous cases explicating the general rule. In all of them the prior settlement amounts were less than the amount of the judgment obtained.[1] The rule was easily applied in these cases to reduce the judgment. In each case the judgment debtor/wrongdoer was required to pay some part of the total damages of the plaintiff. In at least one of the cases cited, *Franklin Supply Co. v. Tolman*, 454 F. 2d 1059 (9th Cir. 1971), the particular item included in the prior settlement was easily identifiable as a part of the subsequent judgment.

Here, however, as pointed out, there is no way, with the present state of the record, to determine which part of the total claimed damages was paid by any one or more of the tort-feasors.[2] Adopting the rule urged by the defendants would discourage settlements by a plaintiff with those deemed most culpable because he would thereby forfeit his right to obtain

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[1] The case of *Wessel v. Buhler*, 437 F. 2d 279, 283 (9th Cir. 1971) does mention the fact that ". . . many of the plaintiffs had settled for more than the jury had awarded them. . ." The court in that case did not, however, undertake to hold how that particular problem was to be resolved.

[2] At trial evidence of the prior settlement was withheld from the jury. This has been deemed the "better procedure." *Billiot v. Sewart Seacraft, Inc.*, 382 F. 2d 662, 665 (5th Cir. 1967); *Martello v. Hawley*, 300 F. 2d 721, 724 (D. C. Cir. 1962).

anything additional from those deemed less culpable, or who might ultimately be found to be so. The defendants here *have* been found to be culpable. They should not be allowed a "free ride"[3] because they declined, for whatever reason, to participate in the pretrial settlement. They, as the adjudicated wrongdoer, ought to be the ones to point out where and to what extent the judgment against them is already covered by the prior settlement. This they candidly admit they cannot do.

The defendants' motion for a credit on the judgment is denied;

And it is so ordered.

/s/ G. V. BRYAN
United States District Judge

Alexandria, Virginia

July 29th, 1975

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[3] Conceivably the defendants could be deprived of such a ride by an action for contribution against them by the persons or firms which settled with the plaintiff. Whether such an action will be brought, and to what extent it would be successful are matters of speculation, of which the defendants here are not entitled to the benefit.

Burrus, Cootes and Burrus
et al., Appellants,

v.

Edwin R. MacKethan, Receiver of Norfolk
Savings and Loan Corporation, Appellee

No. 75-2130.

United States Court of Appeals
Fourth Circuit

Argued May 5, 1976

Decided July 21, 1976

Receiver of savings and loan corporation brought suit against accounting partnership, seeking recovery for alleged violation of antifraud provisions of Securities Exchange Act. The District Court, Eastern District of Virginia, awarded receiver $1,-100,000,and accountants appealed. The Court of Appeals, Wyzanski, Senior District Judge, held that "certificates of investment" issued by savings and loan corporation did not constitute "securities" within meaning of Securities Exchange Act, and thus accountants could not be found in violation of Act for activities involving such certificates.

Reversed and remanded with directions.

1. **Building and Loan Associations Key 40**

In both form and substance, "certificate of investment" issued by savings and loan corporation is essentially an evidence of indebtedness, a promise to pay, and not distinguishable in

any significant way from passbook issued by savings bank. Code Va. 1950, §§ 6.1-231, 13.1-2.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Securities Regulation Key 42**

Securities Exchange Act was not intended to reach instruments evidencing ordinary banking and like accounts. Securities Exchange Act of 1934, §§ 3(a)(10), 10(b), 15 U.S.C.A. §§ 78c(a)(10); 78j(b).

3. **Securities Regulation Key 42**

Even though savings and loan corporation sought to attract savings accounts by calling depositors "investors" in certificates of investment, "certificates of investment" were actually equivalent to bank deposits and a form of "currency," and did not constitute "securities" within the meaning of Securities Exchange Act, and thus corporation's accountants could not be found guilty of violation of Securities Exchange Act in regard to such certificates. Securities Exchange Act of 1934, §§ 3 (a)(10), 10(b), 15 U.S.C.A. §§ 78c(a)(10), 78j(b); Code Va. 1950, §§ 6.1-231, 13.1-2.

See publication Words and Phrases for other judicial constructions and definitions.

Robert M. Hughes, III, and C. Michael Montgomery, Norfolk, Va. (Richard S. Harman, Jerrold G. Weinberg, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Stackhouse, Weinberg & Stewart, Norfolk, Va., on brief), for appellants.

J. Vernon Patrick, Jr., Birmingham, Ala. (Barton S. Sacher, Berkowitz, Lefkovits & Patrick, Birmingham, Ala., Oren R. Lewis, Jr., John E. Fricker, Lewis, Wilson, Cowles, Lewis & Jones, Ltd., Arlington, Va. on brief), for appellee.

Before RUSSELL, Circuit Judge, WIDENER, Circuit Judge, and WYZANSKI, Senior District Judge.*

WYZANSKI, Senior District Judge:

This is an appeal by defendants from a judgment in the United States District Court for the Eastern District of Virginia against them based upon a jury's verdict of $1,100,000 for plaintiff.

Plaintiff is the receiver of Norfolk Savings and Loan Corporation, organized as an Industrial Loan Corporation under the laws of Virginia. Defendants are Burrus, Cootes, and Burrus, a partnership engaged in the practice of certified public accounting, and individual partners in that firm.

For present purposes, it is only necessary to state that plaintiff complained that defendants, by alleged manipulative and deceptive practices in connection with certificates issued to depositors of Norfolk Savings and Loan Corporation, aided and abetted a violation of Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated by the Securities and Exchange Commission pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

What constituted the principal gravamina of the 3-count complaint were plaintiff's allegations that when defendants, in the practice of their calling as certified public accountants, conducted examinations of Norfolk Savings and Loan Corporation, before it was placed in receivership with plaintiff as receiver,

* Sitting by designation.

the defendants by their acts and omissions engaged in manipulative and deceptive, and, therefore, fraudulent practices which constituted violations of federal law. Allegations of violations of state law were added to the complaint upon the theory that there having been alleged causes of action colorably within the federal jurisdiction, causes of action under state law could be attached on the supposed basis of pendent jurisdiction.

By appropriate motions, beginning with pre-trial motions to dismiss and for summary judgment and including suitable motions at the end of plaintiff's case, after the taking of evidence had been concluded, and after the jury had returned its verdict, defendants contended that there had not been alleged, and there was never proven, a valid cause of action founded on any federal law or otherwise brought within the jurisdiction of the United States District Court.

Succinctly stated, the only question presented which requires our opinion is whether a certificate issued to a depositor of Norfolk Savings and Loan Corp. is a "security" within the meaning of § 3(a)(10) of the Securities and Exchange Act of 1934. 15 U.S.C. § 78c(a)(10). If it is not such a security, then, confessedly, there never was alleged a valid cause of action based on federal law and there never was jurisdiction in the District Court to hear any part of the complaint, not even the state causes of actions which were within federal jurisdiction only if pendent to a colorable federal cause of action.

Because the question presented is no narrow, our recital of the facts may be brief.

The obligor is the Norfolk Savings and Loan Corp., a corporation organized under Virginia law as an Industrial Loan Corporation. It is empowered by state law to issue in return for money deposited by a customer in a savings account in the Norfolk Savings and Loan Corp. a certificate representing the amount so deposited.

Such an instrument is denominated a "certificate of investment." However, despite its name, it is merely either a fully paid account or an installment account under the partial payment system authorized by Code of Virginia, 1950, as amended, Section 6.1-231. The latter type of account may be a regular passbook account, or a Christmas Club-type special account.

When the statute authorizing such a certificate was adopted, it was preceded by a "Report of the Commission to Study Matters Relating to Industrial Loan Associations," H.Doc.No.3, Reg. Sess. 1960, which stated that:

> "A fully paid certificate of investment is similar to a certificate of deposit issued by a bank. Under the installment or partial payment system, the customer opens an account with a relatively small payment and is issued a card or booklet, similar to a passbook issued to depositors by banks. The account bears interest and has the characteristics of a savings deposit in a bank."

Such a certificate embodies a contract by the corporation to pay interest at a fixed rate, unrelated to the profits of the corporation. It creates solely a debtor-creditor relationship. It does not represent any share in the capital of the corporation. Code of Virginia, 1950, as amended, Section 13.1-2. It neither confers nor embodies voting rights. To use the older terminology, it embodies a right *in personam* against the corporation, and not a right *in rem*.

[1] In both form and substance it is essentially an evidence of indebtedness, and only in that sense is it a promise to pay. Its fundamental character is *ejusdem generis* as, and not distinguishable in any significant way from, a pass-book issued by a savings bank, and it is hardly arguable that savings bank account books are securities rather than the equivalent of currency. *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 416, 93 S.Ct. 590-592, 34 L.Ed.2d 608 (1973); *Porter v. Aetna*

Casualty and Surety Co., 370 U.S. 159, 161-162, 82 S.Ct. 1231-1233, 8 L.Ed.2d 407 (1962).

The precise issue before us is whether an instrument with the aforesaid characteristics issued by a savings and loan corporation as the indicium of money deposited in the corporation is a "security" within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) which gives the following definition:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the of which is likewise limited."

In a case cognate to the one at bar, *Bellah v. First National Bank*, 495 F.2d 1109 (5th Cir. 1974), the Court of Appeals held that (absent unusual circumstances which might be found by a trial court in a subsequent trial to impose liability) (See *Bellah*, at p. 1115) a certificate of deposit issued by a national bank has merely a commercial nature and is not of such an investment nature as to constitute a "security" within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10). The kernel of Circuit Judge Gewin's opinion, at p. 1114, follows:

[3] Section 78c(a)(10) of the Securities Exchange Act of 1934 includes as a security a "certificate of deposit, for a security." Under the judicial gloss placed on this language, a certificate of deposit issued in exchange for currency is not encompassed within the section because currency is not a security. *Superintendent of Insurance of State of New York v. Banker's Life & Casualty Co.*, 300 F.Supp. 1083, 1099 (S.D.N.Y.1969), aff'd, 430 F.2d 355 (2d Cir. 1970), rev'd on other grounds, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed.2d 121 (1971); *SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F.Supp. 3, 31 (S.D.N.Y. 1968) aff'd on other grounds, 435 F.2d 510 (2d Cir. 1970). To the extent that the Bellahs rely on a contrary proposition, their argument is thus unavailing.

We regard the foregoing opinion and the cases there cited as sound, and as requiring us to reverse the judgment in the case at bar. *Ex majore cautela*, however, we add further reasons for our conclusion.

Section 3(a)(10) in referring to a "certificate of deposit, for a security" has a negative pregnant; impliedly it excludes a certificate of deposit issued for currency or payable in currency.

A certificate of deposit is far more like commercial paper than any other obligation. Not only is it payable in dollars according to its terms either on demand or at a fixed future date, but what the payee receives is principal and interest at a stipulated rate. In no aspect is the obligation keyed to the profitability of the obligor's enterprise or to his skill.

Were a certificate of deposit to be treated as a security there would be superimposed upon an already existing pattern of federal or state banking or like regulations which govern banks, trust companies, savings and loan associations, and other institutions for deposit of currency, a further, and perhaps not wholly suitable, pattern of regulations by the SEC. There is no

indication in the text of the statute, nor in a Congressional committee report, nor even in a legislator's speech on the floor that Congress intended to provide for an overlap with all its risks of inter-agency conflict and of the SEC's want of specialized relevant expertise in this particular field of banking. What *Tcherepnin v. Knight*, 389 U.S. 332, 340-341, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967), quotes from what was said to Congress by a representative of savings and loan associations relates not to certificates of deposit as such, but more likely to shares sold by such associations, and those are of a wholly different nature, being keyed to profits and involving, usually, shareholder participation in the enterprise.

Nor do we find particularly relevant to the instant case the holding, the dicta, or in, to use a word Justice Holmes cherished, the "afflatus" of *Tcherepnin*. There it was held that the antifraud provisions of the 1933 and 1934 acts administered by the SEC applied to that type of certificate issued by a savings and loan association under which the holder was not a creditor but a shareholder, where his return was not on the basis of a contract to pay a fixed rate of interest but a share of the profits, where the right of the holder to make voluntary withdrawals was restricted, and where the instrument could be transferred by written assignment accompanied by delivery of the certificate. We regard as obvious a distinction between the type of instrument involved in *Tcherepnin* and the certificate of deposit which is before us: one is a share, and the other is a banker's obligation to pay a debt.

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975) is not addressed to the precise problem we face. Nonetheless, each party to this litigation finds some comfort in phrases taken from the opinion in *United Housing*. However, we regard the issues there as so unlike the ones before us that we see no advantage in either stopping here to analyze that case nor culling from it brocards or glittering generalities.

[2] We prefer to let our judgment be guided by our strong feeling that the 1933 and 1934 statutes administered by the SEC were not intended to reach instruments evidencing ordinary banking and like accounts, no matter how alluringly, pervasively, competitively, and (as plaintiff asserts in the case at bar) deceptively the banking company, or its near equivalent the savings and loan corporation, sought to attract such accounts, even to the point of flattering depositors by calling them "investors" in "certificates of investment" instead of what they truly were, certified holders of bank deposits.

[3] Inasmuch as an ordinary certificate of deposit of a banking and loan corporation is merely an instrument which constitutes evidence of principal and interest payable because of currency deposited in an account (no matter if the "rose" is given another name), it is not a "security" but is more like a form of "currency" and so is excluded from the 1934 securities legislation administered by the SEC. Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10).

Having concluded that the certificates in issue were not securities, we reverse the judgment and direct that a judgment for defendant be entered by the District Court.

So ordered.

Edwin R. MacKETHAN, Receiver of
Norfolk Savings and Loan
Corporation, Appellee,

v.

BURRUS, COOTES AND BURRUS,
et al., Appellants.

No. 75-2130.

United States Court of Appeals,
Fourth Circuit.

Argued May 5, 1976.

Decided Dec. 10, 1976.

Action was brought by receiver of savings and loan corporation against accounting partnership and its partners for allegedly aiding and abetting violations of anti-fraud provisions of federal securities laws. The United States District Court, Eastern District of Virginia, Albert V. Bryan, Jr., J., awarded receiver $1,100,000 and defendants appealed. The Court of Appeals, Wyzanski, Senior District Judge, on petition for rehearing, withdrew its earlier opinion at 537 F.2d 1262 and held that $6,000,000 payment made to receiver in settlement of claims against other alleged joint tort-feasors was required to be used as a credit wiping out the whole of defendants' liability under verdict and judgment for $1,100,000, since, inter alia, at least the larger part, if not all, of $6,000,000 settlement necessarily covered same damages.

Petition for rehearing granted, but prior judgment reaffirmed and judgment of district court reversed with directions to enter judgment for defendants.

Damages Key 63

In action by receiver of savings and loan corporation against accounting partnership and its partners for aiding and abetting violations of antifraud provisions of federal securities laws, by reason of claimed failure of disclosure, $6,000,000 payment made to receiver in settlement of claims against other alleged joint tort-feasors was required to be used as a credit wiping out the whole of defendants' liability under verdict and judgment for $1,100,000, since, inter alia, at least the larger part, if not all, of $6,000,000 settlement necessarily covered same damages. Securities Exchange Act of 1934, §§ 3(a)(10), 10(b), 15 U.S.C.A. §§ 78c(a)(10), 78j(b).

Harvey L. Pitt, General Counsel, Jacob H. Stillman, Asst. General Counsel, and Frank A. Wilson, Atty., Washington, D. C., filed a brief for the Securities and Exchange Commission, amicus curiae, in support of appellee's petition for rehearing.

Robert M. Hughes, III, and C. Michael Montgomery, Norfolk, Va. (Richard S. Harman, Jerrold G. Weinberg, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Stackhouse, Weinberg & Stewart, Norfolk, Va., on brief), for appellants.

J. Vernon Patrick, Jr., Birmingham, Ala. (Barton S. Sacher, Berkowitz, Lefkovitz & Patrick, Birmingham, Ala., Oren R. Lewis, Jr., John E. Frimker, Lewis, Wilson, Cowles, Lewis & Jones, Ltd., Arlington, Va., on brief), for appellee.

Before Russell, Widener, Circuit Judges, and Wyzanski, Senior District Judge.*

Wyzanski, Senior District Judge:

Following the July 21, 1976 filing of our opinion and entry of our judgment in this case, see 537 F.2d 1262 (C.A.4, 1976),

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* Sitting by designation.

appellees, supported by the SEC as *amicus*, petitioned for rehearing. Responding, we withdraw our earlier opinion, substitute this one, and leave unchanged our July 21, 1976 judgment which reversed the District Court's judgment and directed that a judgment for defendants be entered in the District Court.

As submitted by the District Judge in his charge to the jury (not as pleaded in the three-count complaint), this case (alleged to be an action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, 15 U.S.C. § 78j (b), 17 C.F.R. § 240.10b-5) presented the issues whether defendants Burrus, Cootes and Burrus (a partnership of certified accountants and its partners), by failing to disclose facts readily available to them in 1971 and 1972, aided and abetted violations of the Securities Act of 1933 and of the Securities Exchange Act of 1934, committed by Hall, Warren, and other officers and employees of Norfolk Savings and Loan Corporation, a savings and loan corporation organized under the law of the State of Virginia, all as part of a scheme to defraud that corporation; if so, whether those violations caused damages to the savings and loan corporation; and, if so, regardless of the relative blame between defendants and others, what losses (including losses before 1971 concealed from NS&L by the wrongful acts or omissions of defendants) did NS&L, as distinguished from its creditors, depositors, or shareholders sustain.

The District Court instructed the jury that "The security here invested is the certificate of investment issued to an individual depositor, and you are told that this is a security within the meaning of the Federal Securities Law as a matter of law."

Respondent to the District Judge's instructions, which, obviously, unified the three-count complaint, eliminated any cause of action based upon local law of the State of Virginia, purged the case of any suggestion that defendants were principals, emphasized that they were charged solely as abettors of a scheme of the officers and employees of NS&L to defraud NS&L, in-

cluded in potential damages all fraudulent acts involved in the alleged scheme, regardless of the date of their occurrence, which defendants concealed from NS&L, and precluded apportionment of blame between defendants and such other participants in the alleged scheme as were not defendants, the jury returned a verdict of $1,100,000 and interest for plaintiff, MacKethan, who as the receiver of NS&L appointed by the Court of Law and Chancery (now the Circuit Court) of Norfolk, Virginia, had become, by operation of law, assignee of the claims of NS&L.

The District Court entered on July 25, 1975 judgment on the verdict.

Defendants moved to have allowed as a credit against that judgment of $1,100,000 plus interest, the $6,000,000 paid to MacKethan, Receiver of NS&L jointly by Virginia National Bank (VNB), Landmark Communications, Inc., Landmark Securities, Inc., Paul S. Huber, Jr., S. C. Lampert, James W. Roberts, Herman L. Wright, and Henry J. Lankford in order to release all claims that the Receiver had against VNB and the other corporations and individuals just named, including all claims "asserted in civil actions heretofore instituted by the Receiver against the Released Parties, *provided*, however, that this Release is without prejudice to claims" against BC&B and its partners, who, of course, are parties to the instant case.

The foregoing settlement agreement, to which defendants' motion in the District Court refers was executed March 2, 1975, and was later amended in respects not here material. In the settlement agreement (in addition to matters not here relevant, such as a $600,000 payment to settle a class suit, 74-0013-R, brought by Smith and other so-called investors in NS&L) there were careful recitals that among the claims being released by Receiver MacKethan were (1) those which the Receiver had presented against Virginia National Bank in Civil Action No. 203-74-A, in which a jury had returned a verdict for the Receiver and a judgment had been entered in favor of the Receiver,

but there was pending a motion by VNB for judgment notwithstanding the verdict, or for a new trial, and (2) those which the Receiver had presented against Landmark Communications, Inc. and Landmark Securities, Inc. in Civil Action No. 202-74-A, in which a jury had returned a verdict for the Receiver, and judgment had been entered in favor of the Receiver, but there was pending a motion by defendants for judgment notwithstanding the verdict or for a new trial.

Examination of the pleadings in Civil Action No. 203-74-A, the suit against VNB, and in Civil Action No. 202-74-A, the suit against Landmark Communications, Inc. and Landmark Securities, Inc., as well as other parts of the voluminous record before us, fully supports the statement in the July 29, 1975 Memorandum and Order of District Judge Bryan, who had tried those two cases as well as the instant one, that "The testimony in all three actions concerning damages was substantially the same. In each action the plaintiff claimed damages totalling between ten and eleven million dollars."

Indeed, there seems to us no other way of looking at these three cases, 203-74-A, 202-74-A, and the instant case, other than as based, in each instance, on the claim of the Receiver of NS&L that that corporation was defrauded of $11 million by a scheme of directors and officers of NS&L aided and abetted by VNB and by accountants including BCB and its partners. The operative facts were substantially similar in the c[illegible] against each alleged participant in the scheme; although to [illegible]ach the alleged wrongdoer reliance was placed sometimes upon state law and sometimes upon the federal Securities Act of 1933 and Securities Exchange Act of 1934.

Logically there is, apparently, at least a partial overlap between what was covered by the jury verdict in the instant case and by the March 2, 1975 settlement.

The jury in the instant case (not knowing anything about the earlier cases No. 203-74-A and 202-74-A, nor anything

about the $6 million settlement) assessed at a total of $1,100,-000 the damages sustained by the Receiver from such part of the scheme as BCB and its partners abetted. Inasmuch as the jury's verdict in the instant case was not tailored to special questions, we do not know whether the jury regarded BCB as having abetted the *whole* of the scheme, or as having abetted only the fraudulent activities *after 1971* without participating in the concealment of the pre-1971 frauds. Either possibility would have been consonant with the options left to the jury by Judge Bryan in his charge. What we do know is that the March 2, 1975 settlement with the Receiver gave him $6,000,-000 part of which, if not all of which, necessarily covers the same damages to NS&L as were included in the $1,100,000 verdict and judgment in this instant case. And, indeed, there seems no rational ground for supposing that less than $1,100,-000 of the $6,000,000 settlement payment applied to the very same damages embraced by the jury's verdict in the instant case.

Nonetheless, in his July 29, 1975 Memorandum and Order District Judge Bryan denied *in toto* defendants' motion for a credit on the judgment. His reasoning was that "It is impossible for the Court, with or without the benefit of the former trial proceedings, to apportion the verdicts or the settlement payments, or all of them, so that it can be determined whether there is an overlapping of recoveries." For the reasons given in the previous paragraph of the present opinion, we differ with the District Judge. Nor do we find ourselves in agreement with the way he disposes of the cases which have led the American Law Institute to propose in a tentative draft of Restatement (Second) of Torts § 885(3) (Tent. Draft No. 16, 1970) the following rule:

> Payments made by any person in compensation of a claim for a harm for which others are liable as tort-feasors diminish the claim against them, whether or not the person making the payment is liable to the injured person, and whether or not it is so agreed at the time of payment, or the payment is made before or after judgment. The extent of the diminution is the amount of the payment made, or a greater amount if so agreed. Restatement (Second) of Torts, § 885(3) (Tent. Draft No. 16, 1970).

We feel constrained to reverse the judgment of the District Court, and to direct it to use the $6,000,000 settlement payment made to the Receiver as a credit wiping out the whole of defendants' liability under the verdict and judgment for $1,-100,000 and costs.

Our conclusion is supported not only by the proposed Restatement of Torts but also by a host of authorities of which it will be sufficient to cite *Snowden v. D. C. Transit System*, 147 U.S.App.D.C. 204, 454 F.2d 1047 (1971); *Screen Gems-Columbia Music v. Metlis & Lebow Corporation*, 453 F.2d 552, 554 (2nd Cir., 1971); and *Gill v. United States*, 429 F.2d 1072, 1078-1079 (5th Cir., 1970). See NOTE, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 Harv.L.Rev. 697, 699 (1955); Prosser, Torts (4th ed., 1971) 310-311.

We are not unmindful that there are often subtleties, both substantive (see *Rose v. Associated Anesthesiologists*, 163 U.S. App.D.C. 246, 501 F.2d 806 (1974)) and procedural (see *Schumacher v. Rosenthal*, 226 F.2d 946, 948 (7th Cir. 1955)) involved in cases where credit is sought by one joint tortfeasor for amounts paid to the injured party by another joint tortfeasor. The primary and secondary authorities which we have cited above furnish from case-law statutes, model uniform laws, textbooks, and student-notes a wealth of suggestive possibilities. They frequently assume the debatable premise that although it is unjust for the injured person to get paid more than a tribunal has found that he was damaged, it is more unjust

that one held to be a wrongdoer should escape any payment because the tribunal in his case found that the injured party suffered lower damages than another tribunal or a settlement agreement had considered as the damages suffered by the same injured party as a result of the same conduct participated in concurrently by the wrongdoer at bar and by the wrongdoer who settled or was earlier adjudicated liable.

But this is not a case in which this court or the trial court needs to invent or apply a subtle rule of doubtful validity. Here there is a plain, straightforward reason to allow defendants a full credit. If the jury in this case was correct in concluding, as we must assume that it did if it followed the judge's charge, that NS&L was damaged by BCB to the extent of only $1,-100,000 by fraudulent conduct abetted by defendants, it follows that the Receiver has no grievance if we attribute a little more than one-sixth of the $6,000,000 which he received as a result of the March 1975 settlement, to damages caused by such fraudulent conduct. The record proves that, measured in any way,—by time-span, by participants, by number of wrongful acts, by magnitudes of fraudulent transactions—one-sixth is demonstrably a gross understatement of an appropriate attribution to that portion of the wrongdoers' fraudulent conduct abetted by defendants.

From the text of this opinion it is transparent that we have not in any way relied for our judgment upon the grounds given in our withdrawn opinion, dated July 21, 1976, appearing in 537 F.2d 1262. Yet we deem it appropriate to emphasize that we are not taking any position on the questions (1) whether the District Judge was justified in ruling as a matter of law, instead of submitting to the jury, the issue whether NS&L certificates of investment were "securities" within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10); (2) whether the gap in the record as originally presented to us can be supplemented in the way used

by appellee; and (3) whether, if the certificates of investment varied in type, it was necessary in other to prove his case for plaintiff Receiver to have shown with specificity when a particular type of certificate was issued, inasmuch as the time of the first issue of that particular type might mark the exact extent of application of federal law. All such questions have become moot as a result of the ground on which we now have rested our reversal of the District Court's judgment.

Petition for rehearing granted; but the July 21, 1976 judgment of this court is re-affirmed, and the judgment of the District Court stands reversed with directions to the District Court to enter judgment for defendants.

Supreme Court, U.S.
FILED
JUN 24 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.: 76-1657

EDWIN R. MacKETHAN, Receiver of
NORFOLK SAVINGS AND
LOAN CORPORATION,

Petitioner,

v.

BURRUS, COOTES
and BURRUS, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

Robert M. Hughes, III
C. Michael Montgomery
Jerrold G. Weinberg
Attorneys for Respondents

Of Counsel:
Seawell, McCoy, Dalton, Hughes, Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
and
Stackhouse, Weinberg & Stewart
1400 Virginia National Bank Building
Norfolk, Virginia 23510

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. : 76-1657

EDWIN R. MacKETHAN, Receiver of
NORFOLK SAVINGS AND
LOAN CORPORATION,

Petitioner,

v.

BURRUS, COOTES
and BURRUS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, Burrus, Cootes and Burrus (hereinafter BCB), hereby oppose the issuance of a Writ of Certiorari to review the December 10, 1976, decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

Petitioner has correctly set forth in the Appendix to his Petition the written opinions of the Courts below. No inference should be drawn from the omission of those oral rulings by the trial court on the issue of jurisdiction. As

pointed out in the July 21, 1976, opinion of the Court of Appeals:

> "By appropriate motions, beginning with pretrial motions to dismiss and for summary judgment and including suitable motions at the end of plaintiff's case, after the taking of evidence had been concluded, and after the jury had returned its verdict, defendants contended that there had not been alleged, and there was never proven, a valid cause of action founded on any federal law or otherwise brought within the jurisdiction of the United States District Court."

537 F. 2d at 1263.

THE JURISDICTION OF THIS COURT

Federal courts lack federal question subject matter jurisdiction in this case because, *inter alia*, the only alleged "securities" involved were ordinary savings accounts and certificates. Should certiorari be granted, this Court should exercise its jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining this suit." *United States* v. *Corrick*, 298 U. S. 435, 440 (1936). See also *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 70 (1939); *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934).

QUESTIONS PRESENTED

Petitioner's presentation of the questions presented does not accurately reflect the circumstances, history, and procedural posture involved in this case. The issues more correctly stated are:

1. Should this case be dismissed for lack of federal subject matter jurisdiction where:

(a) There was no "security" involved within the meaning of the Federal Securities Laws of the United States?

(b) None of the damage claimed arose "in connection with" the purchase or sale of any security?

(c) There was no "use of an instrumentality of interstate commerce or the mails" by defendants in connection with the purchase or sale of a security?

2. Assuming jurisdiction, nevertheless, should the judgment of the Court of Appeals be affirmed[1] because:

(a) The Appellate Court properly allowed defendants credit for payments received by plaintiff from others against whom the same damage was claimed?

(b) The District Court action was barred by *res judicata* and related doctrines?

(c) The District Court action was barred by the statute of limitations?

(d) The plaintiff in the District Court failed to prove scienter?

STATEMENT OF THE CASE

Norfolk Savings & Loan Corporation (hereinafter NSL) was closed on January 2, 1973, and Edwin R. MacKethan was thereafter appointed as Receiver. He contended that a fraud had been perpetrated upon the corporation by its former president, Leon C. Hall, and vice-president, Frank F.

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[1] "A respondent or an appellee may urge any matter appearing in the record in support of a judgment . . . ." *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1940). See also *Ryerson* v. *United States*, 312 U. S. 405 (1941). These points were fully briefed and argued by both parties in the court below. Only certain issues of jurisdiction and the issue of credit will be discussed herein.

Warren, and filed suit against these alleged principal wrongdoers, *Edwin R. MacKethan* v. *Leon C. Hall, et al.*, Civil Action No. 74-0013-R, alleging, *inter alia*, that they had violated the Federal Securities Laws. The Receiver claimed damages in the amount of Eleven Million Dollars ($11,000,000). This suit against these principal wrongdoers is still pending trial.

In addition to the action against principal wrongdoers, the Receiver brought separate actions against others claiming, *inter alia*, aiding and abetting the principal wrongdoers in the perpetration of the fraud. Those actions filed in the District Court at Alexandria included *MacKethan* v. *Virginia National Bank*, C/A No. 74-203-A; *MacKethan* v. *Landmark*, C/A No. 74-204-A, and the case at bar. In each action the Receiver claimed the same eleven million dollar loss.[2]

The first case tried was *MacKethan* v. *Landmark* which resulted in a verdict for the plaintiff in the amount of Two Million Dollars ($2,000,000). The second, *MacKethan* v. *Virginia National Bank*, resulted in a judgment for the plaintiff in the amount of Four Million Dollars ($4,000,000). In both actions, as in the case at bar, the Receiver claimed that defendants had aided and abetted the principal wrongdoers in causing a loss of between ten and eleven million dollars. As noted by the District Judge in his opinion denying credit, "the testimony in all three actions concerning damages was substantially the same." There was no attempt by plaintiff in any action to have the jury determine those damages caused solely by any defendant or those damages caused during any particular period of time.

[2] In addition to these actions the Receiver filed the following additional actions for the same loss: *MacKethan* v. *Burrus, Coates & Burrus*, Cir.Ct.Norfolk, L-73-1300 (breach of contract malpractice action which resulted in a judgement of $384,150 plus interest which has since been satisfied); *MacKethan* v. *VNB*, Cir.Ct.Norfolk, L-74-541; *MacKethan* v. *Landmark*, Cir.Ct.Norfolk, L-74-540; *MacKethan* v. *Peat, Marwick, Mitchell*, Cir.Ct.Norfolk, L-74-620; *MacKethan* v. *Hall, et al*, Cir.Ct.Norfolk, C-73-960; *MacKethan* v. Commonwealth, et al, United States District Court, Richmond, C. A. No. 74-0013-R.

Subsequent to judgement being entered against Virginia National Bank and Landmark, the Receiver entered into a settlement agreement with these defendants and several of the outside directors of NSL. The Release executed in accordance with the agreement provided in part that, "the undersigned Receiver hereby releases and discharges the Released Parties, and each of them, from any and all claims or demands the Receiver has or may have against the Released Parties, including all claims, *demands, or causes of action asserted in civil actions heretofore instituted by the Receiver against the Released Parties*, ..." (emphasis added). The settlement was for Six Million Dollars ($6,000,000) and was concluded prior to trial of the instant action.

Before trial below the Receiver moved to exclude certain evidence from the jury, including facts pertaining to the other suits, the amounts of damages claimed therein, and the settlement effected. In the Brief supporting this motion Receiver's counsel quoted from *Billiot* v. *Sewart Seacraft, Inc.*, 382 F. 2d 662, 665 (5th Cir. 1967):

> *"If the trial is to a jury, we think that the better procedure is to withhold evidence of the settlement from the jury* which will determine the total damages, if any, caused by Seacraft. The trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant." (emphasis supplied in plaintiff's Brief)

(Vol. I, p. 213)[3]

Plaintiff's motion was granted. (Vol. XXV, p. 45).

Trial of this case resulted in a verdict in favor of the plaintiff in the amount of $1,100,000. In accordance with the rulings on the pretrial exclusionary Motion of Plaintiff, evidence on the prior settlements was presented to the Court

[3] References are to Record on Appeal in the Court Below.

out of the presence of the jury, and the issue of credit was submitted to the Court for determination. Credit was denied by Opinion dated July 27, 1975, set forth at Page A-12 of the Appendix to the Petition for Certiorari.

BCB appealed urging nine errors which would result in the reversal of the judgment below, but not a new trial. By Opinion dated July 21, 1976, the Court of Appeals reversed the District Court, holding that the NSL savings certificates were not securities within the meaning of the Federal Securities Laws; therefore, the Court lacked subject matter jurisdiction. Plaintiff petitioned for a rehearing which was granted, resulting in a new Opinion dated December 10, 1976. The Court of Appeals withdrew its earlier Opinion, but affirmed its judgment reversing the District Court on the ground that defendants were entitled to a credit. Plaintiff again sought rehearing which was denied. The Petition for Certiorari was received by defendants on May 26, 1977. For the reasons set forth below the Petition for Certiorari should be denied.

THE BASIS FOR THE DISTRICT COURT'S JURISDICTION OF THIS ACTION

The only basis of federal jurisdiction alleged in the Complaint was Section 22 of the Securities Act of 1933 (15 U. S. C. §77u[a]) and Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. §78aa). Pendant claims were also alleged but dismissed before trial. This was not appealed. To the extent that Petitioner now attempts to base federal jurisdiction on other statutes, such is improper.

Respondents have contended from the outset that the District Court lacked federal subject matter jurisdiction. Because this is a threshold question which must be met before any other issue raised by the Petition, Respondents feel constrained to discuss it here.

Federal Courts have no jurisdiction over the subject matter of a case under the Securities Exchange Act of 1934 unless the acts complained of were in connection with the purchase or sale of a *"security"* as the term "security" is construed under Section 3(a)(10) of the 1934 Act, 15 U. S. C. Section 78c(a)(10).

This Court has mandated that in considering whether an instrument is a security, "form should be disregarded for substance and the emphasis should be on economic reality." *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975); *Tcherepnin* v. *Knight,* 389 U. S. 332, 333 (1967). Thus, even if the certificates of investment could be deemed to come literally within one of the categories listed in Section 3(a)(10) — and they do not — that would not be controlling since that section in its introduction requires that initial consideration be given to the "context" of the transaction which generates the instrument.

Attention must first be focused on a description of the certificates of investment and their economic context. The NSL certificates were either fully paid or installment accounts under the partial payment system. Code of Virginia, 1950 as amended, Section 6.1-231. The latter accounts included regular passbook accounts as well as Christmas Club-type special accounts. Perhaps the best description of these accounts is found in the legislative history of the Virginia Industrial Loan Association Law.

A study by the Virginia Legislature, Senate Document No. 12 Reg. Sess. 1950, entitled Virginia Industrial Loan Association Law, supports the conclusion that the NSL accounts are identical to a "savings deposit in a bank."

> "It will be noted that certificate of investment accounts are substantially similar to time deposit accounts in banks. Withdrawals from certificate of investment accounts under the partial payment system are not, and probably cannot lawfully be

made by checks drawn upon an association, but generally the time restrictions on withdrawals are waived and an 'investor' may make withdrawals as readily from an association except for this checking feature, as from a bank. It has been suggested that certificate of investment accounts with industrial loan associations are more nearly analogous to bond sale transactions than they are to time deposit accounts with banks. This may be true as to the sale of fully paid certificates of investment but even as to such sales there is a material difference in that the ordinary bond is a comparatively long term agreement generally secured by specified collateral or receipts, whereas, the ordinary fully paid certificate of investment is payable on notice of 90 days or less and is not secured as bonds generally are. As to the sale of certificates of investment under the partial system constituting 89.25% of the total value of certificate of investment accounts as of December 31, 1948, there is little or no analogy to a bond sale transaction. The latter generally involves the purchase of a promise to pay a fixed sum at a fixed future date which promise cannot be enforced until that date. The promise is generally a long term obligation and, since the purchaser cannot recover the whole or any part of the purchase price from the seller until maturity, or increase the principal amount of that particular contract, the obligation does not involve the keeping of an open account by the purchaser with the seller. The sale of certificates of investment under the partial payment system, to the contrary, involves the keeping of a running account by the 'investor' with the association of amounts placed by the former with the latter from time to time as the former desires, the whole or any part of which may be withdrawn by him at any time, subject generally to 30 days notice,

which notice is generally waived. These running accounts and transactions therein are evidenced by passbooks similar to passbooks furnished depositors in banks, payments to the accounts are referred to in the passbooks as 'deposits' and the accounts are referred to in advertising as 'savings accounts'." *Virginia Industrial Loan Association Law, supra,* at 7.

A further study entitled Report of the Commission to Study Matters Relating to Industrial Loan Associations, H. Doc. No. 3 Reg. Sess. 1960 at p. 7 concluded:

> "A fully paid certificate of investment is similar to a certificate of deposit issued by a bank. Under the installment or partial payment system, the customer opens an account with a relatively small payment and is issued a card or booklet, similar to a passbook issued to depositers by banks. The account bears interest and has the characteristics of a savings deposit in a bank."

The conclusion of these studies that "certificates of investment" are analogous to savings accounts and certificates of deposit is further confirmed by the most recent study which has been commissioned by the Virginia General Assembly. Following the closing of NSL, the General Assembly directed the State Corporation Commission to recommend legislative reform for the regulation of all Virginia financial institutions. In describing the operations of industrial loan associations, the report stated:

> "Industrial loan associations authorized to sell certificates of investment may use both the fully paid and partial payment system. A fully paid certificate of investment is similar to a certificate of deposit issued by a bank. A certificate of investment purchased in installments is similar to a savings account in a bank." *Report of the State Corporation Commission,* S. Doc. No. 8, Reg. Sess. 1974 (Va.)

Certain distinctive features of the NSL certificates of investment relevant to the issue of whether they were securities are:

(1) the return to depositors was set contractually at a fixed rate and was unrelated to the profits of NSL, so that depositors were entitled to interest regardless of whether NSL made or lost money in any given year and such interest would not increase or decrease in relation to the profits of NSL;

(XXVI P. 141-3)

(2) they conferred no voting rights;

(XXVI P. 143)

(3) their value was limited to the face amount plus interest and could not fluctuate as a result of the performance of NSL or market factors;

(XXVI P. 143)

(4) the money which was represented by these accounts was not, under Virginia law, any part of the capital of NSL, (Code of Virginia, 1950 as amended Section 13.1-2) and could not be used for the purpose of capital tests under Virginia statutes (e.g., Code of Virginia, 1950 as amended, §6.1-234);

(5) the relationship between NSL and its depositors was that of debtor and creditor;

(XXVI P. 141-3)

(6) they were not negotiable nor transferable in any way and were assignable only on the books of the corporation;

(XXVI P. 143)

(7) the depositors could withdraw their savings at will; and

(8) they were not securities within the terms of Article 8 of the Uniform Commercial Code. Code of Virginia, 1950, as amended, Section 8.8-102.

Consideration of these facts in light of the tests employed by controlling precedent compels the conclusion that NSL certificates of investment were not securities.

As to the law, analysis of the question here must begin with this Court's decision in *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967), and its recent decision in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, (1975). In *Tcherepnin*, this Court held withdrawable capital shares in an Illinois savings and loan association to be securities under the 1934 Act. However, every feature of the shares in *Tcherepnin* deemed pertinent to the holding that those shares were securities is absent here.

(1) In *Tcherepnin* the shareholders were not entitled to a fixed rate of return but rather received dividends based on the amount of profits and only when and if management could produce profits, while here, the rate of return on NSL deposits was fixed and totally unrelated to the profits of NSL. The NSL depositors were entitled to fixed interest (not dividends) regardless of NSL's profitability.

(2) In *Tcherepnin* the shares were, pursuant to Illinois law, part of the capital structure of the association, and the association's capital consisted exclusively of such shares, while here the NSL deposits are excluded from capital and NSL's capital was represented exclusively by its stockholders' equity and retained earnings.

(3) In *Tcherepnin*, the power of the shareholders to make voluntary withdrawals was restricted while a holder of an NSL certificate could withdraw his funds at any time.

(4) In *Tcherepnin* each shareholder became a member entitled to vote, while here, no membership or voting rights were conferred by virtue of the NSL deposits.

(5) In *Tcherepnin*, the shares could be transferred by written assignment accompanied by delivery of the shares without going through the associaton, while here, the certificates were not negotiable nor transferable, and were assignable only on the books of NSL.

(6) In *Tcherepnin* the shareholders were not creditors of the association, while the NSL depositors were creditors.

The necessity for finding the features which existed in *Tcherepnin* before an instrument can be held a security was recently, and conclusively, reaffirmed in *United Housing* v. *Forman*, 421 U. S. 837, (1975). There this Court dismissed for lack of subject matter jurisdiction a Rule 10b-5 claim based on the sale of stock in a cooperative housing project, upon finding that the stock was not a security, despite the fact that Section 3(a)(10) expressly includes "stock" within the definition of security.

In reaching the decision in *Forman*, this Court declared:

"These shares have none of the characteristics 'that in our commercial world fall within the ordinary concept of a security.' H. R. Rep. No. 85, *supra*, at 11. Despite their name, they lack what the Court in *Tcherepnin* deemed the most common feature of stock: the right to receive 'dividends contingent upon an apportionment of profits.' 389 U. S. at 339. Nor do they possess the other characteristics traditionally associated with stock: they are not negotiable; they cannot be pledged or hypothecated; they confer no voting rights in proportion to the number of shares owned; and they cannot appreciate in value."

* * *

"[T]he basic test for distinguishing the transaction from other commercial dealings is

> 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.' *Howey, supra*, 328 U. S., at 301.

This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entreprenurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner, supra* (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin* v. *Knight, supra* (dividends on the investment based on savings and loan association's profits)."

421 U. S. at 851, 2.

The right to receive interest from NSL was not contingent upon an apportionment of profits of the enterprise. No capital appreciation resulting from the development of the common enterprise or participation in its earnings based on profits could be expected, reasonably or otherwise. No other feature commonly associated with a security was present. All factors recognized by *Forman* and *Tcherepnin* as being necessary for finding a security are absent here.

Recent decisions even prior to *Forman* have consistently found that ordinary banking transactions are commercial in nature and thus not investments which involve securities for the purposes of the application of the anti-fraud provisions of the federal securities laws. *C. N. S. Enterprises, Inc.* v.

G. &G. Enterprises, Inc., 508 F. 2d 1354 (7th Cir. 1975), *cert. denied*, 423 U. S. 825 (1975); *McClure* v. *First National Bank*, 497 F. 2d 490 (5th Cir. 1974), *cert. denied*, 420 U. S. 930 (1975), *Bellah* v. *First National Bank*, 495 F. 2d 1109 (5th Cir. 1974); *Thorp Commercial Corp.* v. *Northgate Industries, Inc.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,929 (D. Minn. 1974); *Avenue State Bank* v. *Tourtelot*, 379 F. Supp. 592 (N. D. Ill. 1974); *City National Bank* v. *Vanderboom*, 290 F. Supp. 592 (W. D. Ark. 1968), *aff'd* 422 F. 2d 221 (8th Cir. 1970), *cert. denied*, 399 U. S. 905 (1970). Cf. *Oliver* v. *Bostetter*, CCH Fed. Sec. Law Rep. ¶96,059 (D. Md. 1977).

Thus, for instance, the Fifth Circuit recently held an ordinary certificate of deposit not to be a security. In so holding, it considered significant the fact that the certificates of deposit were commercial in nature, that they lacked the investment character necessary for a finding of a security, and that the holders were not dependent on the skill and efforts of the bank's management since their return was not related to the profits of the enterprise. *Bellah* v. *First National Bank, supra*, 495 F. 2d at 1114-16.

Moreover, NSL's certificates of investment are expressly excluded from the statutory definition since Section 3(a)(10) of the 1934 Act provides that "security" shall not include currency. Bank accounts are perhaps the most common medium in which currency is maintained and it is therefore submitted that a reasonable reading of the federal securities laws requires the conclusion that savings accounts such as the present are currency and thus, excluded from the definition of a security. In other contexts, this Court has recognized that savings accounts have the "quality of moneys" and were not investments. *Philpott* v. *Essex County Welfare Board*, 409 U. S. 413, 416 (1975); *Porter* v. *Aetna Casualty & Surety Co.*, 370 U. S. 159, 161-62 (1962). Indeed, even the Securities and Exchange Commission in its accounting and reporting Regulations S-X considers as "cash and cash items" not

merely cash but also demand and time deposits, and certificates of deposit. *See, e.g.*, 17 C. F. R. §§210.5-02.1, 6-03.1 (1975). Exclusion of savings accounts and certificates from the definition of security as currency is consistent with judicial precedent, *Bellah* v. *First National Bank, supra*, 495 F. 2d at 1114:

> "[A] certificate of deposit issued in exchange for currency is not encompassed within the section [Section 78c(a)(10)] because currency is not a security."

Cf. SEC v. *Fifth Coach Lines, Inc.*, 289 F. Supp. 331 (S. D. N. Y. 1968), *aff'd*, 435 F. 2d 510 (2d Cir. 1970). *See also C. N. S. Enterprises, Inc.* v. *G. &G. Enterprises, Inc., supra*, 508 F. 2d at 1363 (holding a note which served as cash substitute was not a security since the 1934 Act excludes "currency" from its definition of security). Taking a properly realistic view of NSL's certificates of investment, they have the quality of currency and as such are excluded from the definition of a security.

The Receiver in agrument below tried to draw an analogy between the NSL deposits and bonds. That analogy is inappropriate because the deposits are simply not bonds, and also, because bonds, unlike the certificates, are expressly included within the definition of securities under the Act. More fundamentally, the analogy perforce disregards the principal features of bonds which make them securities and which distinguish them from the NSL deposits. Bonds, in a very real sense, are long term investments in an enterprise and their value is dependent upon the profitability of that enterprise. While the return on a bond is fixed, the value of a bond is closely related to the profitability of the enterprise. If a company is successful, a bondholder can reasonably expect profits in the form of capital appreciation. One glance at the financial pages of any newspaper reveals how inexorably intertwined the market value of bonds are with the fortunes

of the enterprise which issues them. Thus, unlike NSL deposits, a bond can and does fluctuate in value, and as a result of such fluctuations which are tied to the profitability of the enterprise, the bondholders profit.

Another obvious distinction—and the one through which the fluctuating value of bonds is manifested—is the negotiability and marketability of the bonds over markets and otherwise. The NSL certificates of investment were *not negotiable or transferable*. Finally, bonds are issued for extended periods of time and cannot be cashed in at the will of the bondholder while an NSL depositor could freely withdraw his savings at any time.

In addition, strong policy reasons require that NSL certificates of investment should not be held to be securities. Consideration of the implications of holding the NSL certificates of investment to be securities demonstrates that extending federal securities law jurisdiction over such accounts would frustrate rather than advance the congressional purpose in enacting the federal securities laws.

If a savings account or something similar to it is a security for one purpose, that same savings account must be a security for all purposes. Utilizing the "touch" test of *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971), if the savings accounts are securities, federal jurisdiction under the securities laws would exist over every instance in which someone withdrew money out of a savings account to purchase or pay for any item and felt that the item was in some manner misrepresented. For the "fraud" would "touch" upon the "sale" of a security—the withdrawal of money from a savings account.

Every corporate fraud perpetrated on a bank would "touch" the bank's depositors who had "bought" their savings accounts. Even theft by a teller from the petty cash would raise the possibility of a federal securities case. Every

run-of-the-mill embezzlement would invite a federal Rule 10b-5 action. Congress did not intend federal jurisdiction to encompass such instruments. Holding that the cerfiticates of investment of NSL are securities would extend jurisdiction to savings accounts for all purposes. Congress intended that the federal securities laws protect investments in securities and not that the laws regulate virtually every transaction involving the exchange of money. Savings institutions are already subject to substantial state regulation and no need exists further to require the already overburdened federal courts and regulatory agencies to assume such overwhelming and unintended responsibilities.

For the foregoing reasons, the NSL certificates were not securities and the Federal Courts lack jurisdiction.

In addition, the suit was jurisdictionally defective as there was no evidence of any damages which arose *in connection with* the purchase or sale of a security. Petitioner's argument below very simply was that NSL sold "certificates of investment" to depositors, that NSL received money in exchange for those "certificates of investment," and that thereafter the assets of NSL of which the deposited monies were a part were wrongfully diverted by the officers of NSL via embezzlement, insufficiently collateralized loans to corporations in which the officers had an interest, etc.

The District Court summarized the evidence and charged the jury as follows:

> "The security here involved is the certificate of investment issued to an individual depositor, and you are told that this is a security within the meaning of the Federal Securities Law as a matter of law.
>
> "The Norfolk Savings & Loan Corporation received, of course, currency in exchange for the certificates of investment, and Norfolk Savings & Loan Corporation, as a corporate entity, was deceived into

believing it would receive, or retain for its own use, the entire proceeds of those certificates of investment.

"If the corporation was defrauded when its assets of which the deposits were a part were misappropriated, or diverted by its own officers, or even by its own officers and with the concurrence of the directors, the Federal Securities Act protects any person, damaged, where there is a sale of a security, and where fraud is used in connection with that sale or purchase.

"The corporation, Norfolk Savings & Loan Corporation, is such a person protected by the Federal Securities Law, even though the defrauding of it came at the hands of its own officers, or even of its own officers and concurred in by its directors."

(XXXII, pp. 1092-3)

While the "in connection with" issue was not reached by the Fourth Circuit, the Ninth Circuit has dealt with it in *Rochelle* v. *Marine Midland Grace Trust Co. of N. Y.*, 535 F. 2d 523 (9th Cir. 1976), a case identical with the facts in this case as summarized in the charge of the District Court.

Rochelle involved a suit by the reorganization trustee of Sunset International Petroleum Corp. (Sunset) against former officers and directors and an independent CPA, Arthur Young & Co., (Young).

The factual circumstances of *Rochelle* were set forth by the Ninth Circuit at pp. 526-7. While the description is lengthy, its striking similarity to the case at bar justifies our setting it forth herein.

"* * * * Sunset's financial statement for the period ending August 31, 1965, certified by Young on November 12, 1965, reported Sunset's net worth to be in excess of $16,000,000. This 1965 statement was

included in Sunset's 1965 Annual Report, its proxy statement of March 24, 1966, and two S 1 Registration Statements filed with the Securities and Exchange Commission (SEC), effective August 26, 1966. Sunset's September 1966 statement was even rosier. It showed a net worth of more than $18,000,000, with current assets exceeding current liabilities by over $7,500,000. Sunset's financial statement for the period ending September 30, 1966 was certified by Young as of December 1, 1966. All of the roses wilted in 1967. Assets were written down $20,000,000 as of July 31, 1967, although the write down was not published until December 1967, when it was revealed in proxy materials relating to CUC's acquisition of Sunset. At that time Sunset showed an earned surplus deficit of $3,000,000, and a $19,000,000 provision for loss. The 1967 proxy materials also first disclosed to the public that Sunset had unsuccessfully tried to raise operating capital through its 1966 debenture offering, that Sunset's operating capital was exhausted, that it was unable to meet its real property tax obligations, and that it was in default on purchase money loans secured by its real estate.

"The securities involved in this litigation are some of Sunset's debentures. Sunset, as issuer, received full value on the debentures that it publicly sold. On two occasions Sunset repurchased its debentures at a discount; on a third occasion, on September 8, 1966, it reacquired some of its 6¼ percent debentures with a face value of $100,000 at a price of $100,000, then immediately resold them for $80,000. The only loss that it alleges from its dealings in its own debentures is the $20,000 lost on its resale of the debentures acquired on September 8, 1966. It does not contend that resale was below market value. The cumulative financial effect of its acquisition and resale of its

debentures was to reduce Sunset's indebtedness by $805,600 at a cost of $629,200."

(footnotes omitted) 535 F. 2d at 526-7.

In discussing the applicability of the Federal Securities Laws, the Court stated:

"The complaint avers adequate facts to show that the 1965 and 1966 financial statements, included in Sunset's Annual Reports, its proxy statements, and its two registration statements were seriously misleading and that the named officers and directors participated in producing these misrepresentations of its financial condition. Young prepared and certified these financial statements.

"Rochelle's Section 10(b) and Rule 10b-5 action against the defendants reaches swampy territory when we ask whether the manipulative devices, fraud, and claimed breaches of duty were 'in connection with' the purchase or sale of the debentures and whether these activities caused any potentially recoverable damage to Sunset.

"Sunset's securities transactions fall into three categories: (1) Its June 1965 acquisition of its 5 percent debentures with a face value of $600,000 for $450,000, and its September 1966 acquisition of similar debentures with a face value of $105,000 for $79,200; (2) its September 1966 acquisition of its 6¼ percent debentures with a face value of $100,000 for $100,000, and the prompt resale of the same debentures for $80,000; (3) the initial issuance of all of its debentures.

"We agree with the defendants that Sunset cannot base any Section 10(b) or Rule 10b-5 action on the repurchase of its debentures at a discount. Even assuming that the defendants' alleged misconduct

was in connection with these acquisitions, Sunset suffered no loss from them. (*See Foster* v. *Financial Technology, Inc.* (9th Cir. 1975) 517 F. 2d 1068; *Rochez Bros.* v. *Rhoades*, (3rd Cir. 1974) 491 F. 2d 402; *Drachman* v. *Harvey* (2nd Cir. 1972) *(en banc)* 453 F. 2d 722.) We also agree that Sunset had no claim for relief based on its resale of its 6¼ percent debentures in September 1966. The complaint contains no averments attempting to tie in Sunset's resale of these debentures to any wrongful acts or breach of duty by these defendants. Thus, if Sunset sustained a loss on the resale, liability for that loss cannot be fastened on them.

"We turn to the question of whether any claim for relief has been stated against the defendants under the securities laws based on Sunset's issuance of all of its debentures. Each of the defendants asserts that Sunset cannot seek any relief on this series of transactions because Sunset received the full face amount of all debentures issued, from which it realized and used more than $8,000,000. Rochelle admits that Sunset suffered no loss on the issuance of its debentures. *But, he argues, Sunset was nevertheless a loser because the issuance of debentures was part of a larger deceptive scheme by which the defendants created a facade of corporate health when, in fact, Sunset's business was suffering from monetary pernicious anemia.* As Rochelle states in his brief, throughout 1965 and 1966, in furtherance of their scheme, the defendants 'ignored the disastrous cash flow demands of Sunset's real estate projects. Extensive funds obtained from Sunset's debentures and other lenders were expended to satisfy the negative cash flows of various real estate projects, never to be recouped. These expenditures included a huge corporate overhead, including salaries and accounting fees paid to . . . Young . . . service and interest pay-

ments on the real estate projects, and numerous other expenses incurred in the supposed operation and marketing of Sunset's real estate projects. *Simply put, [defendants] purported to maintain a going business when they should have acknowledged a business failure. And, in doing so, they committed a corporate waste.'*

"Rochelle's theory is thus corporate mismanagement, which he has tried to fit within the roomy language of *Superintendent of Insurance* v. *Bankers Life and Casualty Co. ["Bankers Life"]* (1971) 404 U. S. 6, 92 S. Ct. 165, 30 L. Ed.2d 128. Although Section 10(b) was not meant to cover 'internal corporate mismanagement.' '[t]he crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor.' (*Id.* at 12 13, 92 S. Ct. at 169, 30 L. Ed.2d at 134). *Bankers Life* was undoubtedly intended to prevent courts from reading the phrase 'in connection with' grudgingly. The Court did not try to describe how close to the securities transaction the mismanagement must be before it is deemed to touch the transaction. No comprehensive definition of these tactile concepts is practicable; rather each alleged scheme must be examined in its own context to determine whether the deception or mismanagement caused injury to persons suing who bought or sold securities and whether the wrongful conduct sullied the 'purity of the security transaction and the purity of the trading process.' (404 U. S. at 910, 92 S. Ct. at 167, 30 L. Ed.2d at 132.) (*See Smallwood* v. *Pearl Brewing Co.* (5th Cir. 1974) 489 F. 2d 579, 592 594—95).) We assume, *arguendo,* that the alleged mismanagement did taint the purity of the marketing of these debentures and that investors who purchased them thereby suffered injury. Rochelle cannot sue for them

because *Caplin* v. *Marine Midland Grace Trust Co., supra,* disables him doing so.

"Nor can Rochelle maintain this action on Sunset's behalf. In this case, the 'in connection with' requirement bleeds into the requirement that the plaintiff suffer some damages. Sunset could not successfully sue because it lost nothing in its capacity as an investor on the issuance of its debentures. It received full value for the securities; that the directors later frittered away the funds on losing real estate ventures does not mean that Sunset suffered a loss compensable under the federal securities fraud laws. The nexus between the securities transaction and the alleged losses due to mismanagement is too attenuated in this case to use as a predicate for Section 10(b) liability. We thus conclude that the district court correctly dismissed Rochelle's Section 10(b) and Rule 10b-5 claims against all of the defendants."
(footnotes omitted and emphasis supplied)

535 F. 2d at 528-9.

In the courts below, Petitioner attempted to bring this action within the ambit of *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. 6 (1971). Petitioner's reading of *Bankers Life* is too broad. If his position is adopted by this Court, then there can be no act of corporate mismanagement or embezzlement which will not give rise to a cause of action under the Federal Securities Laws.

In *Bankers Life,* defendants fraudulently conspired to acquire control over Manhattan Casualty Company by causing Manhattan to sell its treasury bonds and using the proceeds of that sale immediately to cover a check of one of the defendants given to pay for the Manhattan stock.

To be sure, there were other aspects of *Bankers Life* such as the unauthorized endorsement of a certificate of deposit

by the President of Manhattan Casualty which also formed a part of the fraud. However, this Court restricted itself solely to the treasury bond sale in determining jurisdiction stating:

> "Petitioner's complaint bases his single claim for recovery alternatively on three different transactions alleged to confer jurisdiction under §10(b): Manhattan's sale of the Treasury bonds; the sale of Manhattan stock by Bankers Life to Bourne and Begole; and the transactions involving the certificates of deposit. We only hold that the alleged fraud is cognizable under §10(b) and Rule 10b-5 *in the bond sale* and we express no opinion as to Manhattan's standing under §10(b) and Rule 10b-5 on other phases of the complaint."
> (emphasis added)

404 U. S. at n. 10.

Unlike the present case and *Rochelle*, the proceeds of the sale of the treasury bonds in *Bankers Life* were *never received* by the corporation, and the loss to the corporation was the loss suffered *directly* from the non-receipt of such proceeds. "Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities." 404 U. S. at p. 10.

Like *Rochelle*, in the present case, even if we accept the proposition that the "certificates of investment" given to depositors were "securities," there was no loss to the corporation from their sale because the corporation actually *received* the proceeds from such sales. The loss to the corporation came later, in transactions unconnected with any sale of securities, when Leon Hall and others engaged in corporate mismanagement or embezzlement of the assets of NSL.

Such corporate mismanagement and waste has never been regarded as giving rise to a cause of action under the Federal Securities Laws. In *Bankers Life* this Court agreed that

"Congress by §10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." 404 U. S. at 12.

Moreover, *Bankers Life* is different from the present case in that the fraud in *Bankers Life* could be traced *directly to the proceeds* of the sale of the bonds, i.e., the fraud in *Bankers Life* was directly focused upon the securities transaction both temperally and in terms of design. The proceeds of the sale were not commingled with other funds of the corporaton and there was no evidence that the loss to the corporation might have been caused by waste and mismanagement of general funds. In the NSL case, however, the proceeds from the deposits were taken in by NSL and mixed with all the other funds of NSL. Losses on bad debts, and legitimate loans depleted these resources even where sound business judgment had been exercised by NSL. It is impossible for the Receiver to trace any of the losses, whether fraudulent or non-fraudulent, to the proceeds of particular deposits. The funds fraudulently taken could just as easily have come from commercial loans by NSL or the sale of NSL assets. Under these circumstances, the relation between the deposits and the fraud was too remote and too speculative to satisfy the "in connection" test if that test is to have any meaning at all.

Other decisions handed down subsequent to Bankers Life have not interpreted it to be as broad in its impact as Petitioner suggested below. In *Haberman* v. *Murchison*, 468 F. 2d 1305, 1313 (2d Cir. 1972), the Court required a connection between the securities transaction and the injury:

> "Appellant's other attempts to fit the facts of this case into a Rule 10b-5 claim are equally without merit. He first argued in the District Court that the purchase by Allegheny of its own securities in the summer of 1962 satisfied the purchaser-seller requirement of *Birnbaum*. How that purchase was induced by appellees' withholding material informa-

tion from Alleghany is not clear. In any event, as the District Court observed, since the market price of those securities almost doubled by January 1963 *Alleghany clearly suffered no injury as a result of that transaction."*
(emphasis added)

Schlick v. *Penn-Dixie Cement Corporation*, 507 F. 2d 374, 381 (2d Cir. 1974) cert. denied 421 U. S. 976 (1975), cited *Bankers Life*, but also expressly noted that *"as a result of the sale*, appellant alleges a loss was sustained.'
(emphasis added)

An excellent illustration of the recognition by the circuit courts of the limitations contained in Justice Douglas's opinion in *Bankers Life* may be found in *Vincent* v. *Moench*, 473 F. 2d 430, 434-435 (10th Cir. 1973). The Court held that the "in connection with" language of Section 10(b) must be construed to require "showing a 'causal connection' between the fraudulent sale of a security and the injury" to invoke federal jurisdiction, and found that the necessary causal connection did not exist:

> "Under the well-pleaded facts, Moench devised a scheme to defraud the plaintiffs. In furtherance of the scheme, he deceptively purchased securities from a third party. The plaintiffs were not a party or privy to this transaction, but they claim to have been injured as a result of the effectuation of the scheme. In the final analysis, we have a scheme, a sale, and an injury, but this does not necessarily spell jurisdiction. The question is whether there is a causal connection between the deceptive sale and the injury to the plaintiffs. *Although the deceptive purchase was*, to be sure, a link in the chain of causation, the plaintiffs' injury was the direct result of corporate mismanagement, not of the deceptive purchase. There was, therefore, no requisite causal connection between the

> deceptive purchase and the plaintiffs' injury. The trial court correctly dismissed the complaint . . ."
> (emphasis added)

473 F. 2d at 435

All of these cases relate very closely to NSL's case against BCB. NSL was not harmed by the sale of certificates of deposit for which it received full face value in cash. Nor was NSL damaged as a purchaser in redeeming its certificates since it paid only the same full face value which it had previously received for them. Rather, NSL's injury was the direct result of corporate mismanagement. See *Rosen* v. *Dick*, CCH Fed. Sec. L. Rep. ¶94,786 at p. 96,605, (S. D. N. Y. 1974).

Strong policy reasons also mitigate against a holding that the "in connection with" test has been met in the present case. As noted in *Rochelle, supra:*

> " * * * Because mismanagement will almost surely affect the value of a corporation's securities, and because internal mismanagement is historically a concern of state law, the expansion of Section 10(b) and Rule 10b-5 liability impinges on state regulation of corporations, *(see Popkin* v. *Bishop* (2d Cir. 1972) 464 F. 2d 714, 720) and may balloon the contours of Section 10(b) far beyond congressional intent. * * *"

535 F. 2d at 529 n. 3.

This concern with broadening the scope of the Federal Securities Laws into areas traditionally left-to-state-regulation has also been expressed in this court in its recent opinion in *Santa Fe Industries, Inc.* v. *Green*, ___ U. S. ___, 97 S. Ct. 1292, 1303-4 (1977):

> "The reasoning behind a holding that the complaint in this case alleged fraud under Rule 10b-5 could not be easily contained. It is difficult to imagine

how a court could distinguish, for purposes of Rule 10b-5 fraud, between a majority stockholder's use of a short-form merger to eliminate the minority at an unfair price and the use of some other device, such as a long-form merger, tender offer, or liquidation, to achieve the same result; *or indeed how a court could distinguish the alleged abuses in these going private transactions from other types of fiduciary self-dealing involving transactions in securities. The result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation.* In addition to posing a 'danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5,' *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 740, 95 S. Ct. 1917, 1927, 44 L. Ed.2d 539 (1975), this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a 'federal fiduciary principle' under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. *Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities particularly where established state policies of corporate regulation would be overridden.* As the Court stated in *Cort* v. *Ash, supra,* 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U. S. , at 84, 95 S. Ct., at 2091 (emphasis added)

"We thus adhere to the position that 'Congress by

'10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.' *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. , at 12, 92 S. Ct., at 169. There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of §10(b) and Rule 10b-5 to 'cover the corporate universe'."
(footnotes omitted and emphasis supplied)

NSL was periodically examined and its internal corporate affairs regulated by the State Corporation Commission pursuant to the statutory scheme adopted by the Virginia Legislature. Adequate state court remedies are provided for losses occasioned by the mismanagement and corporate waste of its officers and directors. This is evident in that numerous state court cases were instituted by the Receiver of NSL (see footnote 2, *supra)* and the one against BCB has been reduced to judgment and satisfied.

The Federal Courts lack jurisdiction and this case should be dismissed because of the absence of evidence satisfying the "in connection with" requirement.

ARGUMENT

"A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Supreme Court Rules. Contrary to the assertions of Petitioner, the decision of the Court of Appeals is not in conflict with applicable decisions of this Court, is in harmony with other circuits, and has not departed from the accepted and usual course of judicial proceedings. Certiorari should be denied.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is well established that a plaintiff may not recover duplicate damages from concurrent or joint tort feasors. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 349 (1971) and *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964). In *Zenith* this Court stated:

> "Of course, to the extent that the $10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959-1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. *It is settled that entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.* See *Aro Mfg. Co.* v. *Convertible Top Replacement Co., supra,* 377 U.S. at 502-503, (plurality view); *McKenna* v. *Austin, supra,* 77 U. S. App. D. C., at 234, 134 F. 2d at 665; Restatement, Torts § 885(3) (1939); W. Prosser, Torts § 46 (3d ed. 1964)."
> (emphasis supplied)

401 U. S. at 348

In the case at bar the Court of Appeals allowed a credit because "logically there is, apparently, at least a partial overlap between what was covered by the jury verdict in the instant case and by the March 2, 1975, settlement." 545 F. 2d at 1390. The Court went on to state "there seems no rational

ground for supposing that less than $1,100,000 of the $6,000,000 settlement payment applied to the very same damages embraced by the jury's verdict . . . ."

Therefore, the Circuit Court of Appeals did nothing more than apply the principles enunciated by this Court in *Zenith* to prevent a double recovery. This application was consistent with the policy of this Court.

Petitioner's reliance upon *Lovejoy* v. *Murray*, 70 U. S. (3 Wall) 1 (1865) and similar cases is misplaced. Those cases involved damages caused by joint wrongdoers, reduced to judgment against one, which judgment was not satisfied in full. This Court allowed the plaintiff to pursue the other wrongdoers for the balance of his judgment.

In *Lovejoy* this Court ruled that the plaintiff's judgment was not fully satisfied. This is to be distinguished from the case at bar where the Court of Appeals said that the $1,100,000 judgment against BCB was fully satisfied because of the overlap between the damages represented by the verdict and the prior settlement.

II. THE DECISION BELOW IS IN HARMONY WITH OTHER CIRCUITS.

The circuit court case most in point is *Wessel* v. *Buhler*, 437 F. 2d 270 (9th Cir. 1971). In *Wessel* stockholders of a bankrupt corporation filed suit under the Securities Exchange Act of 1934 and Rule 10b-5 against the corporation's President, certain officers and directors and the corporation's independent accountant. All defendants except the President and accountant effected a settlement of the claims asserted against them prior to trial. Upon trial, the lower court had dismissed all claims against the accountant and entered judgment against the President on separate verdicts awarded each stockholder. The lower court acknowledged

the general rule that there should be a credit against the judgments in the amount of settlements made by the other defendants. Due to an error in the application of the fundamental rule, however, the case was remanded for retrial solely on the issue of damages. In essence the Ninth Circuit held that the amount obtained by each plaintiff from the settlement must be deducted from his individual jury award in order to arrive at the judgment to be entered for each plaintiff.

The pertinent portion of the Ninth Circuit's Opinion in *Wessel* follows:

> "Computation of Damages
>
> "We turn to appellants' claim that the district court erred in computing allowable setoffs in reaching the judgment. Appellants agreed with the court's suggestion that the amounts of their settlements with the defendants who compromised before trial should be deducted from any award they received against the remaining defendants. At the request of the court and defense counsel, each appellant submitted a statement of the amount he had received by way of settlement. After the jury returned its separate verdict for each appellant, the court added all of the verdicts together totalling $51,020. From that total the court deducted the total amounts received in settlement by all of the then plaintiffs, $47,000, and awarded a lump sum judgment against Buhler for the difference, $4,020. Despite appellants' objections, the court completely disregarded the facts that many of the then plaintiffs had settled for more than the jury had awarded them, that there was no uniform relationship between the amount of the jury awards and the amount of the settlements, and that there was no connection at all between the amounts awarded to any plaintiff vis-a-vis any other plaintiff.

> "The error in the court's method of computing the set-offs and ultimately the judgment *can be illustrated by a single example:* Appellant Wessel had invested $30,000 in stock purchased in reliance on two of the prospectuses and $23,000 in reliance on the third prospectus. *The jury awarded him $23,000. He had received by way of settlement $9,972.44. Deducting that offset, he should have received judgment for $13,027.56, exclusive of interest and costs."*
> *Wessel,* 437 F. 2d at 283-284.
> (emphasis added)

The same principles enunciated in *Wessel* have been followed in other circuits: *Screen Gems-Columbia Music, Inc.* v. *Metlis and Leban Corp.,* 453 F. 2d 552 (2d Cir. 1972); *Billiot* v. *Sewart Seacraft, Inc.,* 382 F. 2d 662 (5th Cir. 1967); *Gould* v. *American-Hawaiian SS Co.,* 535 F. 2d 761 (3rd Cir. 1976).

These cases are in harmony with the principle that a plaintiff is only entitled to one compensation for his loss. This is particularly applicable to 10b-5 litigation in which, by express statutory provision, a plaintiff is limited to recovery of "his actual damages on account of the act complained of." 15 U. S. C. §78bb(a).

The Fourth Circuit Court of Appeals, having concluded that the actual damages sustained by plaintiff because of the acts of BCB ($1,100,000) had already been compensated by the settlement, correctly decided that defendants were entitled to a full credit.

Petitioner erroneously stated (Petition p. 14) that the Court below implied that a jury should have determined the credit herein. The Court, in point of fact, made no such implication. It simply stated that the jury's verdict was not tailored to special questions regarding whether BCB had participated in the pre-1971 fraud, 545 F. 2d at 1390. This obviously does not conflict with *Billiot* v. *Sewart Seacraft, Inc.,*

382 F. 2d 662 (5th Cir. 1967) or *Martello* v. *Hawley*, 300 F. 2d 72 (D. C. Cir. 1962) or even Rule 408 of the Federal Rules of Evidence.

Petitioner asserts that the decision below conflicts in principle with *Rose* v. *Asso. Anesthesiologists*, 501 F. 2d 806 (D. C. Cir. 1974) and *American Surety Co.* v. *Sampsell*, 327 U. S. 269 (1946) and unless revised will improperly require the federal courts to deny a full recovery to a plaintiff who enters into a pro tanto settlement. The decision below does not have this result since the court found that Petitioner had received full recovery for the $1,100,000 verdict against BCB.

III. THE DECISION OF THE COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner basically complains that the Court of Appeals disagreed with the trial judge on whether the evidence indicated an overlap between the $6,000,000 settlement and the $1,100,000 judgment against BCB. We submit that this does not justify the issuance of a Writ of Certiorari.

Petitioner places great emphasis on the suggestion that the District Court heard evidence *ore tenus* on the issue of credit, and that the Court of Appeals did not. Except for the oral testimony in the *VNB*, *Landmark*, and instant trials on the issue of damages, all of the evidence on credit was documentary. As to the oral testimony on damages, the District Court concluded "[t]he testimony in all three actions concerning damages was substantially the same." (Petition, p. A-13).

In finding that an overlap existed, the Court of Appeals stated:

"But this is not a case in which this court or the

> trial court needs to invent or apply a subtle rule or doubtful validity. Here there is a plain, straightforward reason to allow defendants a full credit. If the jury in this case was correct in concluding, as we must assume that it did if it followed the judge's charge, that NSL was damaged by BCB to the extent of only $1,100,000 by fraudulent conduct abetted by defendants, it follows that the Receiver has no grievance if we attribute a little more than one-sixth of the $6,000,000 which he received as a result of the March 1975 settlement, to damages caused by such fraudulent conduct. *The record proves that, measured in any way,—by time-span, by participants, by number of wrongful acts, by magnitudes of fraudulent transactions—one sixth is demonstrably a gross understatement of an appropriate attribution to that portion of the wrongdoers' fraudulent conduct abetted by defendants."*
> (emphasis supplied)

545 F. 2d at 1391.

In Section IV 3. of his argument, Petitioner asserts that more than $6,000,000 in damages were occasioned by the settling defendants prior to NSL's engagement of BCB in 1971; that more than $1,100,000 were sustained by NSL after the engagement of BCB; and that, therefore, the entire settlement should be attributed to the pre-1971 time period. These arguments are unpersuasive and should be rejected because of the procedural manner in which Petitioner chose to conduct his litigation against all the parties.

Although, as plaintiff, Petitioner had the opportunity, he elected in the *Landmark* case not to have the jury apportion damages either by time period or defendant. The same election was subsequently made in the *VNB* case and in this case. Rather, in all three actions, he elected to have the case submitted to the jury on the entire claimed loss for the whole time period, and attempted to hold each defendant liable for

such loss regardless of the contributing wrongful acts of any other party.

In the Release with the settling defendants, Petitioner, as a participating party, chose not to apportion damages either by time period or by defendant. Rather he accepted the settlement funds in release of all claims against all of the settling defendants for all time periods.

Petitioner should not now be heard to suggest that the judgment received against VNB and Landmark in their trials and the settlement payments received from VNB, Landmark, and others should be attributed solely to any particular time period or any particular defendant.

Even if Petitioner could now elect to apportion damages by time periods, although he did not do so in the first instance, any reasonable allocation would support the judgment of the Court of Appeals. Petitioner claims a loss over the entire time period of $10,800,000 (Petition, p. 10) and that $2,420,500, or 22%, occurred during the involvement of BCB (Petition, p. 6). Spreading the $6,000,000 settlement over the entire time period would allocate 22%, or $1,320,000, to the post-1971 era. The application of this credit would render the same result reached by the Court of Appeals.

A further suggestion by Petitioner is that the application of credit by the Court of Appeals will discourage future settlements. This ignores the realities of trial litigation. A defendant has incentive to settle as long as his exposure involves a risk in excess of a prior settlement. That risk is always present when the jury is permitted to consider plaintiff's full claimed loss against each of several concurrent wrongdoers, as was the case here. If a plaintiff settles his *entire* claimed loss, there is no risk to non-settling defendants; but, if a plaintiff settles less than his entire claimed loss, he is entitled to proceed further, and the risk to non-settling defendants exists.

CONCLUSION

For the foregoing reasons, Petitioner's request for the issuance of a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. HUGHES, III
C. MICHAEL MONTGOMERY
JERROLD G. WEINBERG
Attorneys for Respondents

Seawell, McCoy, Dalton, Hughes, Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
and
Stackhouse, Weinberg & Stewart
1400 Virginia National Bank Building
Norfolk, Virginia 23510